Petition

81-1550

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

No.

THEODORE F. MELICHAR,
Petitioner,

vs

BETTY JANE OST,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BERT W. KAPINUS
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February 17, 1982

QUESTION PRESENTED

Whether the Court of Appeals applied the proper test in determining whether payments specified in a Property Settlement and Separation Agreement were a dischargeable debt under 17(a)(7) of the pre-1978 Bankruptcy Act, 11 U.S.C.A. Section 35(a)7[1], where the agreement was prepared in anticipation of the wife's forthcoming marriage and the payments were intended for her use during that marriage.

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[1]Because the bankrupt's petition was filed in 1976, that provision rather than its successor in the Bankruptcy Reform Act of 1978, 11 U.S.C. Section 523(a)(5) applied. For purposes of this case, the language of the two sections is the same.

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IN THE

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THEODORE F. MELICHAR,

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VS

BETTY JANE OST,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals of the Fourth Circuit is reported at 661 F.2d 300 (App. 1a). The District Court's opinion (App. 1b) reversing the Bankrupty Judge is reproduced herewith. Prior to the District Court's decision reversing the Bankrupty Judge, the District Court remanded the matter back to the Bankruptcy Court for further consideration on two separate occasions (App. 1d and 1f). The Bankruptcy Judge's responses to the two remands (App. 1c and 1e) are reproduced herewith along with the Bankruptcy Judge's initial order and opinion (App. 1g).

JURISDICTION

The opinion of the Court of Appeals was filed on October 6, 1981. Petitioner filed a timely Petition for Rehearing which was denied by order of the Court of Appeals on November 19, 1981. This petition is being filed within ninety days of that order. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals applied the proper test in determining whether payments specified in a Property Settlement and Separation Agreement were a dischargeable debt under 17(a)(7) of the pre-1978 Bankrupty Act, 11 U.S.C.A. Section 35(a)7[1], where the agreement was prepared in anticipation of the wife's forthcoming marriage and the payments were intended for her use during that marriage.

STATUTORY PROVISIONS INVOLVED

Bankruptcy Act, Section 17 (11 U.S.C. Section 35)

§ 17. Debts Not Affected by a Discharge. a. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as * * * (7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for breach of promise of marriage accompanied by seduction, or for criminal conversation; * * *

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[1]Because the bankrupt's petition was filed in 1976, that provision rather than its successor in the Bankruptcy Reform Act of 1978, 11 U.S.C. §523(a)(5) applied. For purposes of this case, the language of the two sections is the same.

STATEMENT

Petitioner, the husband, filed a petition for voluntary bankruptcy in 1976, seeking to discharge various obligations including the sum of $66,550.00, which had been provided as a payment to Respondent, the wife, under the terms of a Marital Separation Agreement.

The Marital Separation Agreement was executed on April 18, 1974, in the State of Illinois, where both parties resided. Mr. Melichar sought to be discharged from the payments specified under Paragraph 8 of the agreement, which provided:

> "The husband further covenants and agrees that he shall pay to the wife as and for a lump sum settlement in lieu of alimony, the sum of SIXTY SIX THOUSAND FIVE HUNDRED FIFTY and NO/100 ($66,550.00) DOLLARS, said sum to be payable at the rate of FIVE HUNDRED FIFTY and NO/100 ($550.00) DOLLARS per month for a period of ONE HUNDRED TWENTY ONE (121) months, the first of said payments to be made simultaneously with the execution of this agreement by both parties. It is further provided that the husband shall be liable for such monthly installment payments for a period of ONE HUNDRED EIGHT (108) months or nine (9) years, regardless of the remarriage of the wife. The parties further covenant and agree that after the expiration of the aforesaid ONE HUNDRED EIGHT (108) months or nine (9) year period, if the wife is already married or if the wife should remarry, the obligation of the husband for any future payments shall abate, however, the husband shall be liable for any past due unpaid installments then due and owing. In the event of the death of the husband or wife, at any time during the ONE HUNDRED TWENTY (121)

> months, there shall be a one hundred percent (100%) abatement of the respective future installents due and owing to the wife pursuant to the provisions of this Agreement."

The wife filed a complaint objecting to the dischargeability of the debt and a hearing was conducted before the Bankruptcy Judge on December 14, 1976.

During the hearing before the Bankruptcy Judge, the wife testified that the parties were divorced on July 18, 1974. She remarried on August 3, 1974 (Tr. 11). The wife further testified that she did not know how the sum specified in the agreement was determined (Tr. 18). She did, however, testify that Petitioner told her he would provide money enough for her to live on if she would grant him a divorce. The amount would be what she needed to live on (Tr. 18). She testified that the monthly payments were agreed upon with the knowledge of her upcoming marriage to Mr. Ost (Tr. 18), and that the intention of the agreement was that payments be made regardless of her remarriage (Tr. 19).

Petitioner testified that the wife had been living with Mr. Ost, her present husband, at the time the parties entered into the agreement (Tr. 31). He further testified that the wife was to be remarried (Tr. 33), and that her remarriage was a consideration for some of the provisions of the agreement (Tr. 33, Tr. 35). On cross-examination, Petitioner testified that the reason for the fixed sum was to avoid alimony because the wife knew she was getting remarried, and to make it financially feasible for her to get remarried (Tr. 35, Tr. 38). The payments, according to Petitioner, were to make it financially comfortable for the wife in her new marriage, and that she maintains the same economic standards she had previously enjoyed.

At the conclusion of the hearing, the Bankruptcy Judge ruled in his order dated February 2, 1977 (App. 1g), ". . . that the amount payable to the wife was to maintain her

economic position and . . . in the nature of alimony and is non-dischargeable pursuant to Section 17(a)7 of the Act." An appeal was taken to the United States District Court and the case was assigned to the Honorable Frank J. Kaufmann. After having considered the written Briefs of each of the parties and oral argument, the District Court then undertook a legal analysis of the evidence and issues presented and concluded that the Bankruptcy Judge's findings as set forth in his February 2, 1977 order were "conclusory and more than a bit too bare" (App. 1f). The District Court further concluded that the Bankruptcy Judge was in a better position than he to determine the intentions of the parties and then remanded the case to the Bankruptcy Judge for further elucidation and clarification in light of the legal analysis set forth in his opinion. The Bankruptcy Judge filed a further statement of facts and conclusions of law supportive of his original decision. Again after extensive briefing and oral argument, the District Court remanded the matter in an order dated November 4, 1978, requesting the Bankruptcy Judge to make specific findings of facts and conclusions of law "taking into account all of the terms and provisions of the Settlement Agreement, including, *inter alia,* (1) the notation of a "fixed sum", (2) the continuation of payments after remarriage, (3) the termination of payments upon the husband's death, (4) the termination possibility after 108 months, (5) the wife's adultery and her recrimination defense to divorce, (6) factors which the parties maintain went into the calculations of the amounts provided for in the agreement, and (7) the provisions for waiver of alimony." On December 21, 1979, the Bankruptcy Judge filed additional statement of facts and conclusions of law. After having considered these last findings (App. 1b), the District Court concluded that the wife had not shown by a preponderance of the evidence that the obligations of the Petitioner under Paragraph 8 of the Marital Separation Agreement were in the nature of alimony and it reversed the Bankrupty Judge's original decision and the wife then filed an appeal from that order.

The Court of Appeals then proceeded to reverse the decision of the District Court and affirmed the Bankruptcy Judge's decision declaring the payments to be non-dischargeable pursuant to Section 17(a)(7) of the Bankruptcy Act, 11 U.S.C.A 35(a)7.

ARGUMENT

I

THE COURT OF APPEALS USED AN IMPROPER TEST TO DETERMINE THE DISCHARGEABILITY OF PETITIONER'S PAYMENTS.

The Court of Appeals used an improper test to determine whether payments specified in a Marital Separation Agreement are dischargeable under 17(a)7 of the Bankruptcy Act, U.S.C.A. Section 35(a)7.

The Court ruled that "the proper test of whether the payments are alimony lies in proof of whether it was the intention of the parties that the payments be for support rather than as a property settlement". This test overlooks the true nature of those debts which are non-dischargeable under Section 17(a)7, of the Bankruptcy Act. This section does not bind a spouse for all agreements for support and maintenance, but only for those payments which are in discharge of the spouse's common law duty of support. In *Wetmore vs. Markoe,* 196 U.S. 68 (1904), the Court wrote at (Page 72):

> In the case of *Audubon vs. Shufeldt,* 181 U.S. 577, 45 L.Ed. 1010, 21 Sup. Ct. Rep. 736, Mr. Justice Gray delivering, the opinion of the Court said:
>
> "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or im-

> plied, but on the natural and legal duty of the husband to support the wife."
>
> * * *
>
> Hence such alimony cannot be regarded as a debt owing from the husband to the wife and not being so, cannot be discharged by an order of the bankruptcy court". (Page74)

In *In re* Adams, 25 F.2d 640 (2nd Cir., 1928), Judge Learned Hand applied the reasoning of Wetmore in a case factually similar to the instant case. Judge Hand recognized that regardless of when the payments were to be made, the husband would only be liable in bankruptcy for the payments if they were in discharge of his common law duty of support. The true test for determining whether a payment for support is dischargeable is whether it is the intention of the parties that the payments be in discharge of the natural and legal duty (common law duty) of the husband to support his wife.

During the hearing before the Bankruptcy Judge, the wife testified that the monthly payments were agreed upon with the knowledge of her upcoming marriage to Mr. Ost (Tr. 18), and that the intention of the agreement was that the payments would be made regardless of her remariage (Tr. 19). The Petitioner testified that the wife had been living with her present husband at the time the parties entered into the agreement (Tr. 31). On cross-examination, the Petitioner testified that the reason for the fixed sum was to avoid alimony because the wife knew she was getting remarried, and to make it financially feasible for her to remarry (Tr. 34). The payments, according to the Petitioner, were to make it financially comfortable for the wife in her new marriage and to permit her to maintain the same economic standards as she had previously enjoyed. It is noted that the agreement was executed in April, 1974.

The parties were divorced on July 17, 1974 and the wife remarried on August 3, 1974. (Tr. 11)

When all the testimony was considered, it was clear that the payments were agreed upon in anticipation of the wife's remarriage and were intended to make her financially comfortable in her new marriage.

Both the Court of Appeals and the Bankruptcy Judge failed to appreciate the significance between payments intended to support and maintain the wife while single and presumably in need of financial support, and those intended to make a wife financially comfortable upon her remarriage. The Bankruptcy Court in each of its first two decisions erroneously held that where the amount payable to the wife is to maintain her economic position, then it is in the nature of alimony and is non-dischargeable. In the Bankruptcy Court's third response to the District Court's remand, it clearly reveals its lack of understanding as to the nature of those payments which are non-dischargeable under Section 17(a)7 of the Bankruptcy Act. The Bankruptcy Court states:

> "The Court previously found that if it determines that the purpose of the payments is for the support of the wife, the debt is not dischargeable. See Remondino vs. Remondino, 41 Cal. App.2d 208 106, P.2d 437 (1940). *See also,* Kadel vs. Kadel, which held that a lump sum payment for maintenance and support was considered in the nature of alimony and not dischargeable".

The entire thrust of Petitioner's argument from the date he originally filed his petition in bankruptcy was that the payments were intended for the wife's use during her contemplated marriage and therefore not in the nature of alimony. The Bankruptcy Court completely ignored the evidence and arguments in support of Petitioner's position as if they were nonexistent.

The Court of Appeals similarly ignored the record and Petitioner's argument. Nowhere in its opinion did the Court indicate that it gave any consideration to the fact that the payments were intended for the wife's use in her contemplated marriage to Mr. Ost. The Court viewed the issue to be whether "it was the intention of the parties that the payments be for support rather than as a property settlement". The problem with this "either" alimony "or" property settlement analysis is that it leaves no room for recognition of those payments which do not fall into either category. The instant payments are an example of this. The proper dichotomy would be between those payments which arise out of a common law duty versus those payments based upon mere contract, the later being dischargeable. As a result of the Court of Appeals' failure to recognize the nature of those payments which are dischargeable under 17(a)7 of the Bankruptcy Act, the Court reached an erroneous conclusion in this instance.

II.
CONFLICT IN THE CIRCUITS

The Fourth Circuit in this instance held that "the proper test of whether payments are alimony lies in proof of whether it was the intention of the parties that the payments be for support rather than as a property settlement." *Shacter vs. Shacter,* 467 F. Supp. 64 (D. Md.) aff'd without published opinion 610 F.2d 813 (4 Cir. 1979). While this may be a valid test in some instances, it is certainly limited in its application. The Fourth Circuit did not, in the instant case, recognize the limitations of this test and instead used it with procrustean results.

The Court of Appeals should have first attempted to analyze the problem in terms of whether the payments were intended as a discharge of a common law duty for

support. In none of the cases considered by the Fourth Circuit, has there been an indication that any consideration has ever been given to this threshold question.

The Circuits appear to be divided between those which recognize only those payments which are in fulfillment of a common law duty for support as being non-dischargeable under 17(a)7 and those which hold the payments for support and maintenance, regardless of whether there is a common law duty for support, are non-dischargeable. Representative of the former group are *Jones vs. Tyson,* 518 F.2d 678 (9th Cir.); *Gregory vs. Olsen,* 237 F.2d 186 (9th Cir.); *Norris vs. Norris,* 324 F.2d 826 (9th Cir.). The lead case for the second group is *Nichols vs. Hensler,* 528 F.2d 304 (7th Cir.). Other cases in the Seventh Circuit which follow *Hensler* are*Schiller vs. Cornish,* 529 F.2d 1363 and *In Re Woods,* 561 F.2d 27. The Tenth Circuit also appears to adopt the "support and maintenance" or "property settlement" analysis enunciated in *Hensler, supra, Nitz vs. Nitz,* 568 F.2d 148 (10th Cir.) and *In Re Cox,* 543 F.2d 1277 (10th Cir.). Finally, of course, the Fourth Circuit adheres to this faulty analysis, the instant case being a prime example of the Court's erroneous reasoning. The conflict between the Circuits should be resolved particularly because the test utilized in the Fourth, Seventh and Tenth Circuit may lead to decisions which are contrary to the legislative intent regarding dischargeability under 17(a)7 of the Bankruptcy Act.

III.

THE IMPORTANCE OF THIS CASE

In light of the increasing trend in the nation's divorce rate, coupled with an increase in the rate of individual bankruptcies, this case clearly involves a question of exceptional importance meriting consideration by this

Court. Over the last several decades, women have become financially self-sufficient and the traditional one income family has become an anomaly. The entire financial structure of the marital relationship has been altered to the extent that alimony in the case of a divorce is equally available to the husband as the wife, with each spouse contributing to the economic life of the family. Property settlement agreements are likely to become more complex than ever before.

The nation's depressed economy has caused more and more people to seek refuge in the Bankruptcy Courts. There is no indication that this nation's economic climate will improve in the near future. The result being that the courts are likely to be required to rule on whether payments specified in marital separation agreements are in the nature of alimony or property settlement in increasing numbers. Parties to such agreements should have some degree of certainty that their rights and obligations will be preserved as intended by Congress in the event of a bankruptcy action by either party. In light of the Court of Appeal's ruling, there is danger that confusion will arise as to the nature of the payments which Congress intended to be dischargeable and those which should not under the Bankruptcy Act.

CONCLUSION

WHEREFORE, it is submitted that this Court should grant this petition and issue a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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February 17, 1982

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[PUBLISHED]

No. 81-1139

Theodore F. Melichar,

Appellee,

v.

Betty Jane Ost,

Appellant.

In the Matter of:

Theodore F. Melichar,

Debtor.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Frank A. Kaufman, District Judge.

Argued August 31, 1981 Decided October 6, 1981

Before WINTER, Chief Judge, BUTZNER and SPROUSE, Circuit Judges.

Charles C. Bowie (Brault, Graham, Scott & Brault on brief) for Appellant; Bert W. Kapinus for Appellee.

WINTER, Chief Judge:

The issue before us is whether the bankrupt's obligation to make certain payments to his former wife pursuant to a

marital settlement agreement was a debt for "alimony" within the meaning of § 17(a)7 of the pre-1978 Bankruptcy Act, 11 U.S.C. § 35(a)(7)[1] so as to except it from discharge. Originally, the bankruptcy court was of the view that the debt was alimony and was not discharged, and it persisted in that view after two remands. On the third appeal to it, the district court reversed, ruling that the debt was not alimony.

We reverse the district court and reinstate the judgment of the bankruptcy court.

I.

The first opinion of the district court sets out most of the salient facts, Melichar v. Ost, 445 F. Supp. 1162 (D. Md. 1977), and we need only to summarize them:

Theodore F. Melichar and his former wife, now Mrs. Ost, executed a marital settlement agreement in Illinois in April, 1974 when they were still married. So far as pertinent here, the agreement was for Melichar to pay the sum of $66,550 in monthly installments of $550 for a period of 121 months. In the event of the remarriage of the then Mrs. Melichar, Melichar's liability for further payments would abate after 108 months; and in the event of the death of either party at any time, liability for further payments would abate.[2] The parties were divorced in July, 1974 and Mrs. Melichar remarried in August, 1974.

In August, 1976, Melichar instituted a bankruptcy proceeding in the District of Maryland and he sought to be

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[1]Because the bankrupt's petition was filed in 1976, that provision, rather than its successor in the Bankruptcy Reform Act of 1978, 11 U.S.C. § 523(a)(5), applied. For purposes of this case, the language of the two sections is the same.

[2]The agreement also provided for a division of real and personal property, life insurance and support for the issue of the marriage.

discharged from further obligation under the agreement. Mrs. Ost objected, relying upon 11 U.S.C. § 35(a)(7).[3] The bankruptcy judge, after plenary hearing, declared Melichar's debt under the agreement to be nondischargeable as alimony because he found that it was meant "to maintain her economic position . . ." On appeal the district court expressed the view that judged by Illinois law the agreement "contains elements of both a straight property settlement (dischargeable in bankrupty) and of an alimony agreement (which, being based on the common law duty of support, is non-dischargeable)." 445 F. Supp. at 1167. But the district court concluded that the bankruptcy judge's finding as to the purpose of the agreement was conclusory and too bare to dispose of the case and that the bankruptcy judge "is in a far better position than is this Court to determine the intentions of the parties in the light . . . this opinion." 445 F. Supp. at 1170. Accordingly the case as remanded to the bankruptcy judge for further findings and possibly the taking of further evidence.

On remand the bankruptcy judge took no further evidence but he did supplement his previous opinion. He recited the testimony of Melichar that the money was paid to his former wife to be used by her to maintain the same economic position as she had previously maintained during their marriage, and the testimony of the wife that she and her husband budgeted her expenses and arrived at the amount of monthly installments to be paid to her to enable her to support herself while she became settled. As a conclusion of law, the bankruptcy judge stated that the

[3]So far as pertinent, that statute reads:

> (a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (7) are for alimony due or to become due . . . .

"[t]estimony of the parties indicates that the amount payable to the wife was to maintain her economic position and the Court concludes that it is in the nature of alimony and is non-dischargeable . . ."

In a second appeal, the district court again reversed and remanded. While the district court agreed with the implicit finding of the bankruptcy court that Melichar had a legal duty to support his wife, it did not think that the question of whether the parties intended the agreement to fulfill this duty had been specifically found or that the bankruptcy court had considered and determined the meaning of Illinois case law and applied it to the facts of the case.

On the second remand, the bankruptcy court explored the various types of monetary awards that may be ordered by a court under Illinois law and concluded that "the agreement here contemplated support and maintenance of the wife in line with the definition in Illinois law." In further amplification, the bankruptcy court said "[a]lthough the payments do not continue after the husband's death, the sum total of the other facts add up to alimony in gross, intended by the parties as support and maintenance of the wife, in discharge of the husband's common law duty [to support his wife], rather than as a property settlement." It should be noted that strictfly defined, alimony in gross under Illinois law is not modifiable by the Illinois courts and is not extinguished by the remarriage of the spouse receiving payments nor by the death of the spouse making payments. *See* Walters v. Walters, 341 Ill. App. 561, 94 N.E.2d 726, aff'd 409 Ill. 298, 99 N.E.2d 342 (1950).

In the third appeal to the district court, it rejected the bankruptcy court's findings of fact as clearly erroneous and its legal conclusions as incorrect. With regard to the latter, it ruled that the settlement agreement was still ambiguous as to its true nature, that the burden of proving

that the payments thereunder constituted alimony rested on the wife who was contesting the discharge, and that Mrs. Ost had failed to meet that burden so that her objection to the discharge would be dismissed.

II.

We think that the district court was in error in two respects; the second, however, stems from the first.

First, the underlyng premise of its view of the case was that, although the controlling issue was the intention of the parties, it was necessary for Mrs. Ost, in order to establish an intention that payments under the agreement were alimony, to qualify strictly the agreement under Illinois law as an agreement to pay alimony. This she was unable to do because the agreement provided for a cessation of payments in the event of Melichar's death so that it could not be deemed an agreement for alimony in gross. Nor could she qualify it as providing for periodic alimony because the payments might continue after the wife's remarriage.

We do not doubt that classification of an agreement under state law is an important factor in determining if the parties intended an agreement to provide for the payment of alimony within the meaning of § 35(a)(7). But we do not foreclose the possibility that the agreement may be a hybrid of two means of paying alimony recognized by state law, and the fact that it combines features of both does not automatically destroy the nature of the payments as alimony. The proper test of whether the payments are alimony lies in proof of whether it was the intention of the parties that the payments be for support rather than as a property settlement. Shacter v. Shacter, 467 F. Supp. 64 (D. Md.), *aff'd without published opinion,* 610 F.2d 813 (4 Cir. 1979); Nichols v. Hensler, 528 F.2d 304 (7 Cir. 1976); 3 Collier on Bankruptcy ¶ 523.15, at 523-111 (1981 ed.).

The district court's second error was in treating as clearly erroneous the factual finding of the bankruptcy court that the parties intended payments under the agreement as support and maintenance of the wife and not as a property settlement. To a considerable extent it appears that this error stemmed from the distirct court's underlying premise that an intention to constitute payments as support could only be proved by showing that the payments qualified as alimony under state law. In any event, the testimony of Melichar and Mrs. Ost both support the bankruptcy court's finding that the parties intended the payments under the agreement as support: Melichar said that the payments were intended to maintain his wife's economic position as during marriage and Mrs. Ost said that the payments were made to enable her to meet her living expenses after the divorce as budgeted by Melichar and his attorney. A district court has authority to set aside a finding of fact by a bankruptcy court only if it is clearly erroneous. Bankruptcy Rule 810. In our view the bankruptcy court's finding was not clearly erroneous.

It follows that the judgment of the district court must be reversed and the order of the bankruptcy court that the debt is not dischargeable reinstated.

REVERSED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THEODORE F. MELICHAR	:	
		CIVIL NO. K-78-498
v.	:	(BANKRUPTCY NO. K-76-00921 G)
BETTY JANE OST	:	

Filed: November 22, 1980

Bert W. Kapinus, of Mt. Rainier, Maryland, for Appellant.

Charles C. Bowie, of Rockville, Maryland, for Appellee.

KAUFMAN, DISTRICT JUDGE.

This case is before this Court on appeal for the third time following two remands to the Bankruptcy Judge. Neither the factual recitations nor the discussions of law set forth in the prior opinions[1] of this Court or the

[1]The following documents, read in the following order, provide a chronological history of the developments in this case:

(a) The Bankruptcy Judge's first opinion in this case, filed February 2, 1977, set forth as Attachment A to this Court's first opinion in Melichar v. Ost, 445 F. Supp. 1162, 1170-71 (D. Md. 1977).

(b) This Court's said first opinion, 445 F. Supp. 1162 (D. Md. 1977).

c) The Bankruptcy Judge's second opinion, following the first remand by this Court, filed February 16, 1978. *See* Attachment 1 hereto.

(d) This Court's second opinion, filed November 14, 1978, once again remanding the case to the Bankruptcy Judge. *See* Atachment 2 hereto.

(e) The Bankruptcy Judge's third opinion, following the second remand by this Court, filed December 21, 1979. *See* Attachment 3

Bankruptcy Judge will be repeated in full.[2] In response to this Court's latest (*i.e.*, second) remand (Nov. 14, 1978), the Bankruptcy Judge filed, on December 21, 1979, an "Additional Statement of Facts and Conclusions of Law."

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hereto.

(f) This Court's Memorandum to Counsel dated June 10, 1980 asking counsel to submit legal memoranda with regard to Illinois divorce law. *See* Attachment 4 hereto.

(g) Letter to the Court dated July 31, 1980 from counsel for defendant-husband indicating that he did not believe a further legal memorandum on Illinois law would be helpful and that his client would rest on the legal memoranda previously filed in this case. *See* Attachment 5 hereto.

(h) Letter to the Court dated July 31, 1980 from counsel for plaintiff-wife indicating that he too would rely on thbe legal memoranda previously submitted on his client's behalf. *See* Attachment hereto.

(i) This Court's September 3, 1980 Memorandum to the Bankruptcy Judge, with a copy to counsel. *See* Attachment 7 hereto.

(j) The Bankruptcy Judge's September 8, 1980 letter to this Court. *See* Attachment 8 hereto.

As noted above, despite this Court's aforementioned June 10, 1980 Memorandum to Counsel, *see* Attachment 4 hereto, counsel for both parties declined the opportunity to submit any further legal memoranda on the applicable Illinois case and statutory law. *See* Attachments 5 and 6 hereto. In light of said responses, this Court reconsidered its earlier requests to counsel, decided not to require counsel to submit additional memoranda of law, and instead undertook, on its own, an anlysis of the relevant Illinois divorce law.

[2]However, for ease of reading, the following two paragraphs of the parties' marital separation agreement (hereinafter "MSA") are set forth in this footnote, in whole or in part, even though the text of paragraph 8 of the agreement has alrady been set forth in full in this Court's first opinion, 445 F. Supp. *supra* at 1163:

Paragraph 8 of the MSA, the part of the agreement from which the husband now seeks discharge, provides as follows:

> The husband further covenants and agrees that he shall pay to the wife as and for a lump sum settlement in lieu of

It is from that opinion which defendant Melichar[3] appeals for the third time.

In this case, the husband seeks to be discharged from his obligations to his former wife under paragraph 8 of the MSA.[4] The wife objects to that discharge. The burden of

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alimony, the sum of SIXTY SIX THOUSAND FIVE HUNDRED FIFTY AND NO/100 ($65,550.00) DOLLARS, said sum to be payable at the rate of FIVE HUNDRED FIFTHY AND NO/100 ($550.00) DOLLARS per month for a period of ONE HUNDRED TWENTY ONE (121) months, the first of said payments to be made simultaneously with the execution of this agreement by by [sic] both parties. It is further provided that the husband shall be liable for such monthly installment payments for a period of ONE HUNDRED EIGHT (108) months or nine (9) years, regardless of the remarriage of the wife. The parties further covenants [sic] and agree that after the expiration of the aforesaid ONE HUNDRED EIGHT (108) months or nine (9) year period, if the wife is already married or if the wife should remarry, the obligation of the husband for any future payments shall abate, however, the husband shall be liable for any past due unpaid installments then due and owing. In the event of the death of the husband or wife, at any time during the ONE HUNDRED TWENTY ONE (121) months, there shall be a one hudered percent (100%) abatement of the respective future installments due and owing to the wife pursuant to the provisions of this agreement.

Paragraph 9 of the MSA provides in pertinent part that, in the event of divorce, "* * * both parties do hereby waive any and all claims to alimony * * * with the full and complete understanding that once having waived said alimony each shall be forever barred from claiming the same in any Court."

[3]Mr. Melichar, appellant, was the defendant in the proceeding before the Bankruptcy Judge and is referred to herein as "husband." Mrs. Ost, appellee, was the plaintiff in the proceedings below and is referred to herein as "wife."

[4]*See* note 2, *supra*.

proof is on the plaintiff-wife to show that the defendant-husband is not entitled to discharge of his payment obligations under paragraph 8.[5] To be specific, pursuant to section 17a(7) of the Bankruptcy Act, 11 U.S.C. § 35(a)(7),[6] the burden is on the wife to show that the husband's monetary obligations under paragraph 8 of the MSA are ali-

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[5] *See* discussion at pp. 18-23, *infra.*

[6] For ease of reading, the text of section 17a(7), 11 U.S.C. § 35(a)(7), is once again set forth herein. That section provides in relevant part as follows:

> (a) A dioscharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as * * * (7) are for alimony due or to become due, or for maintenance or support of a wife or child, or for seduction of an unmarried female or for breach of promise of marraige accompanied by seduction, or for criminal conversation; * * *.

Under the Bankruptcy Reform Act of 1978, 92 Stat. 2549, 11 U.S.C. § 101 *et seq.*, which went into effect on October 1, 1979, the subject of dischargeability of alimony and support obligations is covered by 11 U.S.C. § 523(a)(5). That section, like section 17(a)(7) of the former Bankruptcy Act, exempts from discharge payment obligations for alimony, maintenance, and support.

The Senate Report accompanying the Bankruptcy Reform Act of 1978 expressly provides: "What constitutes alimony, maintenance, or support, will be determined under the bankruptcy law, not State law." S. Rep. No. 95-989, 95th Cong., 2d Sess. 79, *reprinted in* [1978 U.S. Code Cong. & Ad. News 5787, 5865. The House Report contains virtually identical language. *See* H.R. Rep. No. 95-595, 95th Cong., 2d Sess. 364, *reprinted in* [1978] U.S. Code Cong. & Ad. News 5787, 6320. Both reports also state that the inquiry under the bankruptcy law is "whether a particular agreement to pay money to a spouse is actually alimony or a property settlement." *Id.*

This case is governed by the provisions of section 17a(7) of the prior Bankruptcy Act since it was filed before the effective date of the Bankruptcy Reform Act of 1978. See Pub. L. 95-598, Title IV, § 403(a), 92 Stat. 2683 (Nov. 6,1978).

mony, and hence non-dischargeable, and do not constitute a property settlement.

In its first opinion in this case, this Court concluded that Illinois law governed the interpretation of the MSA. *See* Melichar v. Ost, *supra* at 1167 n.4, and cases cited therein. Subsequent to that first opinion, Judge Blair of this Court wrote that, in a bankruptcy case such as this one, the Bankruptcy Court is required to look to the substance of the payment obligation in question, and not to the labels imposed by state law, in determining whether the obligation is dischargeable under section 17(a)(7) of the Bankruptcy Act. In that case, Shacter v. Shacter, 467 F. Supp. 64 (D. Md. 1979), the husband appealed from an order of the Bankruptcy Court declaring his payment obligations under a separation agreement to be in the nature of alimony and, hence, non-dischargeable. The husband argued that since the payments required by the separation agreement did not satisfy the technical requirements of alimony under Maryland law, the debt was in the nature of a property settlement and, thus, dischargeable in bankruptcy. Rejecting that contention, Judge Blair stated (at 66):

> Payments required by a contract for the support and maintenance of a wife are not dischargeable in bankruptcy even though they do not constitute payments for alimony under state law, *see In re Adams,* 25 F.2d 640, 642 (2d Cir. 1928), and even though the separation agreement itself contains provisions concerning the settlement of property rights of the parties, *see In re Ridder,* 79 F.2d 524 (2d Cir. 1935), *cert. denied,* 297 U.S. 721, 56 S.Ct. 599, 80 L.Ed 1005 (19036). In determining whether certain obligations are liabilities for support, a court should look to the substance of the obligation, and not to labels im-

> posed by state law. *In re Nunnally,* 506 F.2d 1024, 1027 (5th Cir. 1975).[7]

"Alimony" is defined as follows for purposes of the Bankruptcy Act in Nichols v. Hensler, 528 F.2d 304, 307 (7th Cir. 1976):

> The authorities are clear, and the parties do not dispute, that "alimony" in section 17(a)(7) of the Bankruptcy Act means payments in the nature of support for a former spouse. [Citations omitted.] If the debt is determined to be one arising under a property settlement, it is discharged by bankruptcy. [Citations omitted.]

The inquiry required herein is whether the payments under paragraph 8 of the MSA were intended by the parties to fulfill the husband's common law duty to support his wife or, rather, were intended to constitute consideration for an overall property settlement. While that determination is ultimately governed by federal law, and while state law labels are not controlling, state law, nevertheless, is not only relevant, but indeed in the end may provide controlling guidance with regard to construction of the husband's

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[7]On appeal, the Fourth Circuit affirmed in an unpublished *per curiam* opinion. Shacter v. Shacter, 610 F.2d 813 (4th Cir. 1979). Therein, the Fourth Circuit noted that the "Maryland definition of alimony is not technically met, since the separation agreement does not provide for termination of the obligation of support and maintenancae upon the death of the husband." (slip op. at 2.) The opposite is true herein. *See* n.2, *supra.* Accordingly, with regard to that factor, the within case would appear to be a stronger case for alimony than was *Shacter,* though it should be noted that neither Judge Blair's opinion in *Shacter* nor the Fourth Circuit's affirmance relates the facts in detail. As is discussed *infra* in greater detail, the inevitable balancing called for by applicable principles of federal and Illinois law requires close factual analysis in this case.

underlying obligation and determination of the intent of the parties.[8]

The issues herein are rather easy to state. However, they are by no means easy to resolve. Under the applicable federal and Illinois[9] law, there would appear to be five different possible classifications of the payment obligations

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[8]The ultimate determination of whether a payment obligation under a separation agreement is dischargeable under the bankruptcy law requires the threshold determination of the intent of the parties to the agreement. *See, e.g.*, Barth v. Barth, 448 F. Supp. 710 (E.D. Mo. 1978); *In re* Baldwin, 250 F. Supp. 533 (D. Neb. 1966). It is also to be noted that since separation agreements, like the MSA herein, are often negotiated by lawyers, with an eye toward the obligations imposed by the relevant state divorce law, the provisions of such law, while not dispositive, are clearly relevant in determining that intent.

[9]The parties herein were divorced prior to October 1, 1977, the effective date of the new Illinois Marriage and Dissolution of Marriage Act, Ill. Rev. Stat. ch. 40, ¶ 101 *et seq.* (1977), and then the former Illinois Divorce Act, Ill. Rev. Stat. ch. 40, ¶ 1 *et seq.* (1975), was in force and effect.

Section 801 of the new Act provides as follows:

> (a) This Act applies to all proceedings commenced on or after its effective date.
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> (b) This Act applies to all pending actions and proceedings commenced prior to its effective date with respect to issues on which a judgment has not been entered. Evidence adduced after the effective date of this Act shall be in compliance with this Act.
>
> (c) This Act applies to all proceedings commenced after its effective date for the modification of a judgment or order entered prior to the effective date of this Act.
>
> (d) In any action or proceeding in which an appeal was pending or a new trial was ordered prior to the effective date of this Act, the law in effect at the time of the order sustaining the appeal or the new trial governs the appeal, the new trial, and any subsequent trial or appeal.

In Lamp v. Lamp, 73 Ill. App. 3d 713, 392 N.E.2d 349, 352 (1979), the Court discussed section 801 as follows:

> The new Marriage and Dissolution of Marriage Act is applicable to proceedings commenced after October 1,

(1) A property settlement pursuant to section 17 of the Illinois Divorce Act, Ill. Rev. Stat. ch. 40, ¶ 18 (1971)[10].

(2) Periodic alimony pursuant to section 18 of the Il-

1977 involving the modification of maintenance (periodic alimony) and child support provsions of divorce decrees entered prior to the effective date of the new Act. (Ill. Rev. Stat. 1977, ch. 40, par. 801(c); *Pierce v. Pierce,* 69 Ill. App. 3d 42, 25 Ill. Dec. 511, 386 N.E.2d 1175 (5th Dist. 1979).) However, as to property settlement provisions, including awards of alimony in gross, incorporated into divorce decrees which became final before the effective date of the new Act, the law then in effect, including the provisions of the former Divorce Act (Ill. Rev. Stat. 1975, ch. 41 para. 1, *et seq.*) would govern. (*Pierce v. Pierce; Staub v. Staub,* 67 Ill. App. 3d 1004, 24 Ill. Dec. 630, 385 N.E.2d 771 (5th Dist. 1978).) * * *

In the within case, neither periodic alimony nor child support is involved. *See* discussion at p. 9, *infra.* As indicated in *Lamp, supra,* the new Act would accordingly not appear applicable herein. But whether or not the new Act is applicable, the former Illinois law, which was in force and effect when the MSA was executed, would appear relevant in connection with the determination herein of the intent of the parties at the time they entered into the MSA. *See also* Pacione v. Reed, 81 Ill. App. 3d 600, 402 N.E.2d 316, 320 (1980), in which it is indicated that there is little difference in force and effect of the new Illinois Act as compared with the former Illinois law in connection with the determination of whether given payments constitute periodic alimony or alimony in gross, or are part of a property settlement.

[10]Section 17 of the Illinois Divorce Act provides as follows:

> Whenever a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof to be made to the party entitled to the same, upon such terms as it shall deem equitable.

Under that statutory provision, if one of the parties to a divorce proceeding requests that the Court order that title to a particular piece of property be conveyed to him from his spouse as part of the divorce decree, that request must be specially pleaded. *See* Palacio v. Palacio, 33 Ill. App. 3d 1074, 339 N.E.2d 427, 430 (1975). Neither of the parties herein has ever requested any Illinois court to transfer to him or her title to a particular piece of property from the other party to the

linois Divorce Act, Ill. Rev. Stat. ch. 40, ¶ 19 (1971),[11], alimony "for an indefinite period of time and usually for an indefinite total sum," Walters v. Walters, 341 Ill. App.

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marriage. Thus, the provisions of section 17 are seemingly inapplicable since the parties reached a voluntary settlement agreement as to the division of their property and asked only that that agreement be incorporated into the final divorce decree.

[11]Section 18 of the Illinois Divorce Act provides in relevant part as follows:

> When a divorce is decreed, the court may make such order touching the alimony and maintenance of the wife or husband, the care, custody and support of the children, or any of them as, from the circumstances of the parties and the nature of the case, shall be fit, reasonable and just * * *. The court may order the husband or wife, as the case may be, to pay to the other party such sum of money, or convey to the party such real or personal property, payable or to be conveyed either in gross or by installments as settlement in lieu of alimony, as the court deems equitable.
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> * * *
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> Irrespective of whether the court has or has not in its decree made an order for the payment of alimony or support it may at any time after the entry of a decree for divorce, upon obtaining jurisdiction of the person of the defendant by service of summons or proper notice, make such order for alimony and maintenance of the spouse and the care and support of the children as, from the evidence and nature of the case, shall be fit, reasonable and just, but no such order subsequent to the decree may be made in any case in which the decree recites that there has been an express waiver of alimony or a money or property settlement in lieu of alimony or where the court by its decree has denied alimony.
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> * * * A party shall not be entitled to alimony and maintenance after remarriage; but, regardless of remarriage by such party or death of either party, such party shall be entitled to receive the unpaid installments of any settlement in lieu of alimony ordered to be paid or conveyed in the decree.
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> * * *

561, 94 N.E.2d 726,729 (1950), payable in installments.

(3) Gross alimony (or alimony in gross, as it is apparently interchangeably labeled) pursuant to section 18 of the Illinois Divorce Act, *supra, i.e.,* a fixed sum payable in lump at one time or in installments over a fixed period of time.

(4) A non-section 17 property settlement, *i.e.,* a fixed sum payable in lump at one time or in installments over a fixed period of time.

(5) Even if the payment obligations in question do not specifically fall within the technical definitions of periodic or gross alimony under section 18 of the Illinois Divorce Act, *supra,* as those terms have been interpreted by the Illinois courts, the payments may still be classified as alimony under both federal and/or Illinois law if they were intended by the parties to satisfy the husband's common law duty to support his former wife.[12]

The intention of the parties governs the determination as to which of the five types of agreement is in fact involved in a given case. If the parties' intent was not the discharge of a common law duty of support, then the payment obligations are in the nature of a property settlement and are not alimony, either periodic or in gross. If the payments were intended by the parties to discharge a com-

[12]This fifth category may well not be a separate category. Rather, any agreement which falls within it may well fall within either category two or category three. Indeed, the Illinois case law reviewed and analyzed *infra* in the body of this opinion may so teach. In any event, however, federal law would seem to require that this Court recognize, insofar as this bankruptcy case is concerned, this fifth category since neither state law labels nor state law classifications may be permitted in a bankruptcy case to obliterate the basic distinction between an agreement calling for alimony as opposed to a property settlement, namely, whether or not the agreement is in discharge of the common law duty of the spouse-obligator to the other spouse. *See* Schacter v. Shacter, *supra.*

mon law duty of support and the payments were to be made over an indefinite period of time, subject, as a matter of law, to modification by a court if the situation of the parties changed, then periodic and not gross alimony is seemingly involved. If, on the other hand, the parties intended fixed payments in lump or in installments over a fixed period of time, then gross and not periodic alimony is apparently involved.

If periodic alimony is involved and the beneficiary-spouse remarries, "the agreement cannot be enforced [under Illinois law, after such remarriage] despite the specific provisions in the agreement that payments will continue despite plaintiff's remarriage." Richheimer v. Richheimer, 9 Ill. App. 3d 376, 292 N.E.2d 190, 193 (1972). In this case, there is no provision for such continuation of payments after the plaintiff-wife's remarriage. Thus, *afortiori,* if periodic alimony is involved – it is to be noted that Judge Goldburn held that periodic alimony is not involved, and this Court agrees in that respect – then paragraph 8 of the MSA is unenforceable under Illinois law and the issue of whether the defendant-husband's obligations under the MSA are dischargeable in bankruptcy need not be reached.

Thus, if periodic alimony is involved herein, the defendant-husband is entitled to judgment because of Illinois law. If alimony in gross is involved, the defendant-husband is not entitled to the discharge under the bankruptcy law which he seeks and plaintiff-wife is entitled to judgment herein. If a property settlement is involved, the defendant-husband is entitled to such discharge under the bankruptcy law and to judgment herein.

The agreement in this case calls for monthly payments for a fixed amount over a fixed period of either 108 or 121 months, depending on whether the wife remarries. The agreement further provides that if either of the parties

dies, the husband's payment obligations are extinguished.

Illinois case law is instructive even though the lines of definition and distinction between alimony and property settlement and between periodic and gross alimony are certainly not easy to draw. The key issue is whether alimony of any type as opposed to a property settlement was intended. That issue requires an analysis of Illinois statutory and case law.

In Walters v. Walters, 341 Ill. App. 561, 94 N.E.2d 726,729 (1950), *aff'd,* 409 Ill. 298, 99 N.E.2d 342 (1951), the Court enumerated the distinctions between "periodic" alimony and alimony in gross:

> * * * [Periodic or ordinary alimony] is for an indefinite period of time and usually for an indefinite total sum. It is based upon the husband's income and the needs of the wife determined from the standpoint of the manner in which they have been accustomed to live. It is modifiable after decree when the wife's needs increase or decrease, or when the husband's ability to pay increases or decreases. This is so because it takes the form of periodic allowances which do not vest until they become due. It usually terminates upon the death of the husband, although by agreement payments may be amde a charge upon the husband's estate after they become due. They are never a charge on a husband's estate in advance of the due date because they are not, prior to that time, vested. Payments of alimony from husband to wife are not based upon any consideration moving from wife to husband, but are based upon the common law duty of the husband to support his wife. "Alimony" in this sense of the word, is modifiable.
>
> On the other hand, the phrase "alimony in gross" or "gross alimony" is always for a definite

> amount of money; the payment is always for a definite length of time; it is always a charge upon the husband's estate and has uniformly been held by our courts to be not modifiable.

Under Illinois law, either the husband or the wife may be ordered to pay alimony in a particular case. In determining the amount of an alimony award, the Court considers both the need of the party receiving the alimony as well as the ability of the other spouse to pay. *See, e.g.*, Adams v. Adams, 398 Ill. 581, 76 N.E.2d 495 (1948); Still v. Still, 96 Ill. App. 2d 320, 238 N.E.2d 613 (1968). In addition to the needs and abilities of the parties, the Court also considers their respective ages, health, and social conditions, and whether or not one of the spouses is supporting children. *See* Chalmers v. Chalmers, 31 Ill. App. 2d 1, 175 N.E.2d 613 (1961).

The Illinois case law indicates that, as a general principle, it is preferable, whenever possible, for the court to award periodic alimony as opposed to alimony in gross, since an award of periodic alimony can be modified if changes in the situations of the parties so warrant. Alimony in gross, on the other hand, is awarded only in special circumstances where there is reason to believe that the paying spouse has irregular habits or income and, thus, cannot be counted on to make regular payments. *Cf.* Honey v. Honey, 120 Ill. App. 2d 102, 256 N.E.2d 121, 123 (1970) (emphasis in original), where the Court wrote:

> In Schwarz v. Schwarz, 27 Ill. 2d 140, 188 N.E.2d 673, and McGaughy v. McGaughy, 410 Ill. 596, 102 N.E.2d 806, it is said that the usual and proper procedure is to award alimony in periodic payments for the factors of the respective need and abilities of the party then remain within the control of the court. In Dmitroca v. Dmitroca, 79 Ill. App. 2d 220, 223 N.E.2d 545, is

> is said that alimony *in gross* may be awarded where the entire record shows that periodic payments are not feasible, as where the record shows that a spouse does not pay his bills or will not work, Smothers v. Smothers, 25 Ill. 2d 86, 182 N.E.2d 758; Miezio v. Miezio, 6 Ill. 2d 469, 129 N.E.2d 20; or where the husband was regularly intoxicated and refused to work, Persico v. Persico, 409 Ill. 608, 100 N.E.2d 904; or again, where the husband's occupation was so hazardous that he might not be able to continue to produce income, Rodely v. Rodely, 28 Ill. 2d 347, 192 N.E.2d 347. * * *

The distinction between periodic alimony and alimony in gross under Illinois law seemingly rests essentially upon a difference in the nature and timing of the payments. Both forms of payment, however, are apparently designed to serve the same purpose — fulfill the obligation of the spouse with the greater wherewithall to support the other. Thus, in *Walters, supra,* 94 N.E.2d at 729, the Court stated that alimony payments are "based upon the common law duty of the husband to support his wife."[13]

Another type of payment, separate and distinct from either periodic or gross alimony, which may be made by one spouse to the other pursuant to a divorce decree is a property settlement. In that regard Illinois case law indicates that an Illinois divorce decree may incorporate the agreement of the parties to a marriage pursuant to which one spouse will make payments to the other spouse pursuant to an overall property settlement. Such payments, unlike payments for periodic alimony or alimony in gross,

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[13] *See also* Chamberlin v. Chamberlin, 119 Ill. App. 2d 295, 256 N.E.2d 159, 161 (1970); Kohler v. Kohler, 31 Ill. App. 2d 151, 175 N.E.2d 603, 604 (1961); Balasa v. Balasa, 11 Ill. App. 2d 103, 136 N.E.2d 594, 595 (1956).

are designed not to fulfill either party's obligation to support the other, but rather to make a fair division of the parties' real and personal property and thus compensate the receiving spouse for the legal and equitable interest he or she may have in property accumulated by the parties during their marriage.

While, under Illinois law, alimony in gross is distinguishable from a lump sum property settlement, the differences between the two are seemingly sometimes unimportant for purposes of applying that state's divorce law. Thus, for example, in *Walters, supra,* 94 N.E.2d at 730-31, the Court held the installment payments due under a divorce decree to be alimony in gross *or* a lump sum property settlement, as opposed to periodic alimony. In so doing, the Court stated (at 730-31) (emphasis in original):

> That the award may be payable in installments is not determinative of the question as to whether it is gross alimony or periodic alimony. Gross alimony may be payable in installments — whether all cash or all or partly on credit does not affect the essential nature of the transaction. *The principle involved is that gross alimony becomes a vested right from the date of the rendition of the judgment, and the manner of its payment in no wise affects its nature or effect.* It would be a harsh rule that would deprive parties of the right to make final property settlements merely because the one furnishing the money was unable to meet the entire obligation in one payment. * * *

A similar approach is illustrated by Jacobson v. Jacobson, 50 Ill. App. 2d 244, 200 N.E.2d 379 (1964). In that case, the divorced husband brought an action seeking to be released from various payment obligations under a divorce decree on the grounds that his wife had remarried.

In framing the issue to be reseolved, the Court stated (at 380):

> The issue is whether defendant's obligation to pay the $15,000.00 specified in the decree is a settlement in lieu of alimony (sometimes called alimony in gross) or ordinary alimony. * * *

The Court held the payments in question to be "alimony in gross" or "settlement in lieu of alimony" and concluded that the wife was entitled to receive the unpaid installments regardless of her remarraige. In so doing, the Court wrote (at 380-81):

> The problem lies in defining what constitutes a "settlement in lieu of alimony." The method of payment as well as the terms and labels used by the parties and those used in the decree, is not conclusive in determining the nature of the settlement. As the Court in Walters v. Walters, 341 Ill. App. 561, 574, 94 N.E.2d 726, 732 (1950), *aff'd*, 409 Ill. 298, 99 N.E.2d 342 (1951), said:
>
> > It is not the label placed by decree upon payments which constitutes them either alimony or lump sum property settlements; it is the elements inherent in the case as a whole, the record of which the decree is a part, which determine to what category such payments belong."
>
> * * * The problem is a factual one – whether the payments stem from the natural and legal duty of a husband to support his wife or from the legal and equitable interests the wife may have in property accumulated by the parties during their marriage, that is, whether they stem from an alimony or from a property settlement.

Whether particular payments are referred to as "alimony in gross," settlement in lieu of alimony," or "pro-

perty settlement," the Illinois courts seemingly recognize that the parties to a marriage may, prior to divorce, negotiate an agreement under which one spouse agrees to pay the other a sum of money in satisfaction of the latter's legal and equitable interests in the couple's property. Such payments, unlike pure alimony, do not stem from the paying party's common law obligation to support the other spouse.

In Planters Bank and Trust Company of Hopkinsville, Ky. v. Hite, 263 N.E.2d 498 (Ill. 1970), the husband and wife entered into a contract for settlement of property rights which was later incorporated into their divorce decree. Upon the divorced wife's death, the executor of her estate brought suit to recover the unpaid installments due under the settlement agreement. The husband contended that the payments in question were in the nature of alimony, and hence terminated on the death of the wife. In rejecting that contention by the husband, the Court stated (at 499-500) (emphasis in original):

> Were it not for the fact that the questioned paragraph [of the settlement agreement] had its very being in a divorce context, there could hardly be any question of the vested nature of the payments and the executor's right to their continuation, barring the contingency of partial or total disablement. * * *
>
> But regardless of the context, it seems to us that we would be warping meaning if we were to call these payments alimony. Rather, as we see it, this provision is part of the *quid pro quo* of settlement. Walters v. Walters, 490 Ill. 298, 99 N.E.2d 342. For us to say that these payments should cease upon her death would be to alter that *quid pro quo*. This we cannot do. People make agreements, not courts. Courts come in, as

> here, when agreement turns to disagreement but only to resolve the latter, not to remake the former.
>
> But it is argued that all the earmarks of alimony are present if we would only look past form to substance. But the substance, as we see it, is not alimony, but rather an agreement to do something that must be done and continue to be done until a total agreed amount has been paid, barring one contingency. Simply because payments are in installments doesn't make such alimony. * * *
>
> * * * The payments are, as we have said, part of the consideration of a property settlement, and being such, passed on the former wife's death to her executor. * * *

See also Olson v. Olson, 58 Ill. App. 3d 276, 374 N.E.2d 247, 249 (1978) ("The purpose of a settlement agreement is not to provide a means for first determining whether alimony is in gross or periodic in form and then to proclaim that due to the in gross or periodic character of the alimony, certain rights and consequences exist. Rather, the purpose of a settlement agreement is to establish the rights and duties of the parties to the agreement in the first instance. It is those vested rights, freely given by each party, which must control."); Kohler v. Kohler, 31 Ill. App. 2d 151, 175 N.E.2d 603, 605 (1961) ("[I]t is clear from 'the elements inherent in the case as a whole' (Walters v. Walters, 341 Ill. App. 561, 574, 94 N.E.2d 726, 732) that the parties intended the agreement as a property settlement and that consequently it was not subject to modification."); Guyton v. Guyton, 171 Ill. 2d 439, 444-45, 161 N.E.2d 832, 835 (1959) ("The law looks with favor upon the amicable settlement of property rights and is reluctant to disturb decrees based thereon. Walters v. Walters, 409 Ill. 298, 99 N.E.2d 342. It has long been set-

tled that parties to a divorce suit may voluntarily adjust their property interests and the amount, if any, to be paid as alimony; and that when such agreements are made a part of the decree the parties are concluded thereby. Storey v. Storey, 125 Ill. 608, 18 N.E. 329, 1 L.R.A. 320; Buck v. Buck, 60 Ill. 241."); Maybaum v. Mabaum, 349 Ill. App. 80, 110 N.E.2d 78, 82-83 (1952) (applying California law, but indicating that the result would be the same under the law of Illinois: "Notwithstanding the fact that there is reference in the agreement to support money, we are convinced that the payment of $25,000 in installments was consideration for a property settlement which was to be in lieu not only of the plaintiff's right to support but all other claims to any interest in defendant's property or estate.").

Thus, regardless of terminology, Illinois case law appears to indicate that the parties to a divorce may enter into a property settlement agreement (separate and distinct from section 17 of the Illinois Divorce Act) pursuant to which property settlement one spouse agrees to make payments to the other in consideration for the latter's relinquishment of all interests and claims in the former's property. As noted above, said payments, unlike alimony payments, are not premised on the paying spouse's common law duty to support his former mate.

A very recent decision of the Illinois Appellate Court is illustrative. In Pacione v. Reed, 81 Ill. App. 3d 600, 402 N.E.2d 316 (1980), the parties entered into a marital settlement agreement which was later incorporated into their divorce decree. Pursuant to said marital separation agreement, the husband agreed to pay his ex-wife, "as and for her allowance for support and maintainance," the sum of $150 per week for a period of 121 months. In the event the husband died before the expiration of the 121-month period, the unpaid installments were to be paid to the wife

in a lump sum within 90 days of the husband's death. The agreement expressly stated that the payment obligations of the husband were undertaken "in discharge of a legal obligation which, because of the marital or family relationship, is imposed on or incurred by [the husband] under a written instrument incident to a divorce."

Approximately 21 months after the divorce decree was entered, the husband filed for bankruptcy. Characterizing the periodic payments as part of the parties' property settlement, he listed his wife as an unsecured creditor and was subsequently discharged in bankruptcy. The wife responded by filing a petition in the state court seeking to have the husband held in contempt of court for failing to maintain the scheduled payments. The husband moved to dismiss the petition on the ground that his payment obligations had been discharged in bankruptcy. Finding the language of the marital settlement agreement to be ambiguous, the state court denied the husband's motion to dismiss and ordered an evidentiary hearing on the question of the parties' intent. Based on the parol evidence during that hearing, the court concluded that the parties had treated the payments in question as both maintenance and property settlement. Since the parties had not evidenced any intent as to the dischargeability of the payments, the court ordered the payments to be resumed.

The husband then petitioned the court for modification of the parties divorce decree based upon a substantial change in circumstances. After a hearing, the court denied the petition, holding that the payments constituted alimony in gross and were hence non-modifiable, regardless of any change in the husband's circumstances.

On appeal, the Illinois appellate court, noting that the lower court's interpretation and construction of the periodic payment provisions in question should not be set

aside unless "manifestly erroneous," agreed with the lower court's conclusion that the language of the separation agreement, the parties' testimony at the evidentiary hearing, and the parties' treatment of the payments all evidenced a "hybrid intent," revealing characteristics of both an alimony agreement and a property settlement. After explaining the distinguishing characteristics of alimony in gross and periodic alimony under Illinois law (citing *Walters, supra*), the Court stated (at 319-320) (emphasis added):

> Comparing the payments at bar with the above distinction, it can readily be seen that they have the characteristics of alimony in gross, rather than periodic alimony. *More difficult is the ultimate determination of whether the payments are alimony in gross or payments incident to a property settlement.* In discussing the characteristics of a settlement in lieu of alimony in Jacobson v. Jacobson (1964), 50 Ill. App. 2d 244, 200 N.E.2d 379, 381, the court stated:
>
> "* * * The problem is a factual one — whether the payments stem from the natural and legal duty of a husband to support his wife or from the legal and equitable interests the wife may have in property accumulated by the parties during their marriage . . . ."
>
> In the case at bar, the trial court held that the parties treated the payments as both alimony and settlement and the juxtaposing of these elements is frequently encountered in agreements of this nature. [Citations omitted.] Alimony in gross has been characterized as "part of the lump sum property settlement" and "closely connected" with the distribution of real and personal property (Koivun v. Koivun) [45 Ill. App. 3d 39, 359 N.E.2d 215 (1977)], and is often indistinguishable in character from a settlement of pro-

perty betweeen spouses.

It is this problem of definition, usually encountered in differentiating between periodic and gross alimony, that led to the unchallenged hearing on the issue of intent in the case at bar. * * *

* * *

* * * Considering the agreement at bar and the intentions of the parties, we do not find the interpretation and construction of the marital settlement agreement and orders therefrom to be manifestly erroneous. [Emphasis added.][14]

In sum, the Illinois case law would appear to indicate that, just as there is a distinction between periodic alimony and alimony in gross, so is there a distinction between alimony in gross and a property settlement; and that the mere fact that the parties did not request an Illinois court to convey title to a particular piece of property pursuant to section 17 and the consequent inapplicability of section 17 does not necessarily suggest that the payments in question are in the nature of alimony, and not a property settlement. Accordingly, it would appear that if the payments called for under paragraph 8 of the MSA are in the nature of a property settlement, unrelated to the husband's common law duty to support his wife, those payments are not in the nature of alimony under federal or Illinois law and would be dischargeable in bankruptcy, notwithstanding the fact that the payments might be denominated "alimony in gross" under the terminology of Illinois law.

In this case, the inquiry required under federal law is the same as would be necessary if Illinois law were deemed to

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[14]The Court expressly noted that the result reached would be the same under both the Illinois Divorce Act, Ill. Rev. Stat. 1975 ch. 40, ¶ 1 *et seq.*, or the new Illinois Marriage and Dissolution of Marriage Act, Ill. Rev. Stat. 1977 ch. 40, ¶ 101 *et seq.*

be controlling. That inquiry requires a determination of whether the payments under the MSA were intended by the parties to fulfill the husband's common law duty of support and maintenance or, rather, were intended to constitute a property settlement. In its prior two opinions, this Court, applying Illinois law, concluded that it was unable, based on the ambiguous language of the MSA and the existing parol evidence (i.e., the transcript of the original Dec. 14, 1976 hearing), to discern the true intent of the parties. Regrettably, that ambiguity remains unresolved.

Bankruptcy Rule 407, which became effective on October 1, 1973, sets forth the applicable burden of proof standard:

> At the trial on a complaint objecting to a discharge, the plaintiff has the burden of proving the facts essential to his objection.

Thus, in the case at bar, plaintiff-wife has the burden of proving that the payment obligations assumed by defendant-husband under paragraph 8 of the MSA were intended to be in the nature of alimony and, hence, nondischargeable.

Prior to the enactment of Rule 407 in 1973, the rule governing burden of proof in objecting to a discharge was set forth in the following proviso in section 14(c) of the Bankruptcy Act, 11 U.S.C. § 32(c):

> *Provided,* That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the banrkupt.

That proviso was interpreted as requiring the objector to make merely a *prima facie* showing that the bankrupt was not entitled to a discharge under the Act. Once that *prima facie* showing was made, the ultimate burden of proof, not merely the burden of going forward with the evidence, shifted to the bankrupt.

The burden of proof standard was changed, however, by the promulgation of Rule 407 in 1973. The Advisory Committee Note to Rule 407 expressly states:

> The rule supersedes the proviso at the end of § 14c of the Act * * *. The proviso has generally been equated with a requirement that the objector make a prima facie case under § 14c * * *. See, e.g., In re Ploch, 235 F.2d 903, 905 (3d Cir. 1956) ("the burden of proof is on the objecting creditor to prevent the bankrupt's discharge, otherwise stated, the objecting creditor must make out a prima face case"). See also Feldenstein v. Radio Distributing Co., 323 F.2d 892, 893 (6th Cir. 1963); Johnson v. Bockman, 282 F.2d 544, 545 (10th Cir. 1960); Industrial Bank of Commerce v. Bissell, 219 F.2d 624, 625-26 (2d Cir. 1955); Dixwell v. Scott & Co., Ltd., 115 F.2d 873, 875 (1st Cir. 1940); 1 Collier 1314.1-1314.2 (1971).

Collier writes that "[t]his rule [*i.e.*, present Rule 407] places the burden of proving that a bankrupt is not to be granted a discharge on the objectant, *ie.*, the plaintiff." 12 Collier on Bankruptcy ¶ 407.1 at 4-67 (14th ed. 1978). Collier further comments (at ¶ 407.3, pp. 4-69 to 4-70):

> Rule 407 apparently supersedes the proviso to Section 14c and restores the state of the law to that which was in effect prior to 1926 when the predecessor to the proviso to Section 14c first im-

posed on bankrupts the burden of ultimately persuading the trier of the facts by the weight of the evidence that the act charged had not been committed. [Footnote 6 omitted.]

Accordingly, this rule follows the general rule governing the burden of proof in civil litigation and must be read to mean that the plaintiff[7] must make out a prima facie case to withstand a motion by the bankrupt to dismiss and, on all the evidence in the case, sustain the charge against the bankrupt by the preponderant weight of the evidence as in most civil suits.

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[7]Since objections to discharge are adversary proceedings under Rule 701(4), *infra*, to be commenced by filing a complaint under Rule 703 in a form authorized by Rule 7(a) of the Federal Rules of Civil Procedure, applicable to these rules by Rule 707, it follows that the objectant to the discharge is denominated "plaintiff" and the bankrupt "defendant" in the complaint. Rule 407 acknowledges this.

In Matter of Martin, 554 F.2d 55, 58 n.1 (2d Cir. 1977), Judge Lumbard noted:

> The proviso at the end of § 14c placed the burden of proof on the bankrupt once the objector made a prima facie case. *See, generally Industrial Bank of Commerce v. Bissell,* 219 F.2d 624, 625-26 (2d Cir. 1955). This proviso has been superseded by Bankruptcy Rule 407, under which the burden of persuasion remains always on the objector. See Advisory Committee Note. The new rules are applicable to bankruptcy proceedings pending as of October 1, 1973 except to the extent that application would be unfeasible or unfair. [Citation omitted.]

See also Matter of Decker, 595 F.2d 185, 187-90 (3d Cir.

1979).[15]

To the extent that Rule 407 was enacted to supersede the proviso in section 14c of the Act, it might be contended that the burden of proof provision of Rule 407 is applicable only to cases in which a creditor is objecting to a discharge under section 14 of the Bankruptcy Act, 11 U.S.C. § 32, and not to cases, like the within case, in which a creditor is objecting to the dischargeability of a particular debt pursuant to section 17 of the Act, 11 U.S.C. § 35. However, such a contention would not appear meritorious.

In Nitz v. Nitz, 568 F.2d 148 (10th Cir. 1977), a divorced husband petitioned for voluntary bankruptcy and sought to be excused from certain financial obligations which he had assumed under the provisions of his divorce decree. Thereafter, his ex-wife filed a complaint in the bankruptcy court, seeking a determination that the obligations in question were in the nature of support and alimony and, hence, nondischargeable under section 17a(7), 11 U.S.C. § 35(a)(7). The same procedures as were followed by the parties in *Nitz* have seemingly been followed by plaintiff-wife and defendant-husband in the case at bar. In *Nitz*, after trial, the bankruptcy judge concluded that the financial obligations, other than those specifically denominated alimony and child support in the divorce decree, constituted a property settlement between the parties and were, therefore, dischargeable in bankruptcy.

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[15]While Rule 407 imposes both the initial burden of producing evidence and the ultimate burden of persuasion on the objector, the rule leaves to the Court the determination as to the shifting of the burden of going forward with the evidence. The Advisory Committee Note to Rule 407 provides in relevant part:

> This rule does not deal with the burden of going forward with the evidence. Subject to the allocation by the rule of

The wife appealed tha adverse determination to the District Court. That Court reversed the Bankruptcy Judge, holding that the payment obligations were for support, alimony and maintenance of the minor children and, hence, nondischargeable. On appeal, the Tenth Circuit reversed the judgment of the District Court and remanded the case for reinstatement of the order of the Bankruptcy Judge. In so holding, Judge Holloway wrote as follows (at 152):

> The wife as the party objecting to the discharge "has the burden of proving the facts essential to [her] objection." Rule 407, Federal Bankruptcy Rules. The bankruptcy judge was not persuaded by the proof and found that with the exception of the express provisions for alimony and child support, "all remaining obligations imposed on Darrell Nitz, and in favor of Peni Nitz, by terms of the divorce decree, constitute a property settlement between the parties." Obligations which are not in the nature of alimony but are part of a property settlement are dischargeable. See *Caldwell v. Armstrong,* 342 F.2d 485, 488 n.5 (10th Cir.).[16]

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the initial burden of producing evidence and the ultimate burden of persuasion, the rule leaves to the courts the formulation of rules governing the shift of the burden of going forward with the evidence in the light of such consideration as the difficulties of proving the nonexistence of a fact and of establishing a fact as to which the evidence is likely to be more accessible to the bankrupt than to the objector. [Citations omitted.]

[16]*See also* Matter of Amador, 596 F.2d 428, 433 (10th Cir. 1979) (seemingly applying Rule 407 to a case in which the creditor objected to the dischargeability of the bankrupts' debts pursuant to section 17a(2) of the Act, 11 U.S.C. § 35(a)(2), but seemingly dealing with burden of going forward rather than burden of proof).

In *In re* Smith, 436 F. Supp. 469 (N.D. Ga.1977), the bankrupt, a divorced husband, appealed from an order of the Bankruptcy Judge holding that certain payment obligations arising out of the husband's divorce decree were obligations for the support and maintenance of the bankrupt's former wife and, hence, nondischargeable under section 17a(7), 11 U.S.C. § 35(a)(7). On appeal, the District Court affirmed. In so holding, that court indicated that the burden of proof provision of Rule 407 was applicable to a proceeding under section 17 of the Act. However, that court also seemingly interpreted Rule 407 as requiring the party objecting to discharge of the debt to make merely a *prima facie* showing that the bankrupt's payment obligations were in the nature of alimony. Judge Freeman suggested (at 477-78) that once that *prima facie* showing was made, the ultimate burden of proof shifted to the bankrupt to show that he was entitled to discharge:

> Mrs. Smith had the burden of proving that the obligations in paragraphs 2(a), (b) and (g) were in the nature of payments for alimony, support, and maintenance and were, therefore, not dischargeable in bankruptcy. Bankruptcy Rule 407. *In the Matter of Trigg, supra.* Appellee satisfied her burden of making a *prima facie* showing that although the payments in paragraph 2(b) were couched in the language of "installment payments of a lump sum property settlement" for federal income tax purposes, that the payments were, nevertheless, for alimony, support, or maintenance. * * *
>
> After Mrs. Smith made her *prima facie* showing that the payments in paragraphs 2(a), (b), and (g) were rooted in the legal obligation of Mr. Smith to provide continued support and maintenance, it was thereafter incumbent upon the

bankrupt to prove that he was entitled to discharge. *In the Matter of Trigg, supra; In re KDI Corp.*, 477 F.2d 742, 747 (6th Cir. 1973); *Feldenstein v. Radio Distributing Co.*, 323 F.2d 892, 893 (6th Cir. 1963).

With deference, this Court disagrees with the application of Rule 407 in *Smith.*[17] As indicated *supra,* the Advisory Committee Note to Rule 407 specifically states that the rule was intended to supersede the earlier interpretation of the proviso at the end of section 14c, *i.e.,* the former interpretation of the statute which required the objector to make merely a *prima facie* showing that the bankrupt was not entitled to discharge, with the burden of proof then shifting to the bankrupt. Under present Rule 407, by contrast, the ultimate burden of persuasion, not merely the initial burden of producing evidence, remains on the objector. It is to be noted that two of the cases cited by the District Court in *Smith,* namely, *In re* KDI Corp., 477 F.2d 742 (6th Cir. 1973), and Feldenstein v. Radio Distributing C., 323 F.2d 892 (6th Cir. 1963), were decided prior to the enactment of Rule 407. Indeed, the *Feldenstein* decision was cited in the Advisory Committee's Note to Rule 407 as one of the cases setting forth the interpretation of the section 14c proviso which was superseded by the promulgation of Rule 407.

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[17]In Gardner v. American Century Mortg. Inv., 577 F.2d 928, 929 (5th Cir. 1978) (per curiam), a case arising under section 14 of the Act, the Court held that "once a creditor has made a prima facie case for denying discharge the burden of proving that he has not committed acts justifying the denial of a discharge shifts to the bankrupt." In so holding, the Court did not refer to present Rule 407. This Court does not know whether the bankruptcy proceedings in *Gardner* arose prior to or after the effective date of Rule 407. In any event, this Court, in the absence of any contrary expression of view by the Supreme Court or the Fourth Circuit will follow the Advisory Committee's clear statement as to the meaning of present Rule 407.

Accordingly, this Court interprets Rule 407 as imposing upon the plaintiff-wife the burden of proving by a preponderance of the evidence that the obligations in paragraph 8 of the MSA were in the nature of alimony payments and were therefore, nondischargeable in bankruptcy. In this Court's view, plaintiff-wife has not met that burden. During a hearing on the husband's latest appeal held on the record in open Court, counsel for the plaintiff-wife informed this Court that, while his client recognized that she bore the burden of proof in this case, she did not desire to present any further evidence to the Bankruptcy Judge. Thus, the record in this case is essentially the same as it was when this Court first remanded the case alsmost 2-½ years ago. Accordingly, this Court still concludes that the provisions of the MSA are ambiguous and that, based on the existing parol evidence in the record (*i.e.*, the transcript of the December 14, 1976 hearing), it is not possible to discern whether the payment obligations under paragraph 8 were intended by the parties to be in the nature of alimony or, rather, were intended to constitute a property settlement.

For the reasons stated in this Court's two prior opinions in this case and for the further reasons set forth in the within opinion, this Court further concludes that, on the basis of the existing record, the plaintiff-wife has failed to meet her burden of proving by a prepondernace of the evidence that the husband's obligations under paragraph 8 were intended as settlement in lieu of alimony and are, hence, nondischargeable in bankruptcy.[18] In view of plaintiff's declination of the opportunity to present any

[18]It is to be noted that the defendant-husband entered into the agreement in question with full knowledge that his wife intended to remarry as soon as their divorce was finalized and that, upon her remarriage, his common law duty of support would be extinguished.

further evidence to the Bankruptcy Judge or any further legal memorandum to the Bankruptcy Judge or to this Court, and her decision instead to rest upon the existing record, there would rather obviously be no purpose in this Court's again remanding this case to the Bankruptcy Judge for a third time. Accordingly, the Order of the Bankruptcy Judge filed on December 21, 1979 will be reversed.[19] and defendant's payment obligations under Paragraph 8 of the MSA will be discharged pursuant to section 17a of the Bankruptcy Act, 11 U.S.C. § 35(a).

/s/ B. W. Kaufman

United States District Judge

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[19]In so holding, this Court is fully aware that, pursuant to Bankrupty Rule 810, this Court must accept the Bankruptcy Judge's findings of fact unless they are "clearly erroneous" and should "give due regard to the opportunity of the referee to judge the credibility of the witnesses." In United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), Mr. Justice Reed stated: "A finding is 'clearly erreonous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." In this case, giving all due regard to the record herein including each and every one of the Bankruptcy Judge's findings and conclusions, this Court believes that plaintiff-wife has not met her burden of proof and that the contrary conclusion is "clearly erroneous."

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND

IN RE	:	
THEODORE F. MELICHAR	:	
Bankrupt	:	Bankruptcy No. 76-00921 G
BETTY JANE OST	:	
Plaintiff	:	[Filed Dec 21, 1979]
vs.	:	
THEODORE F. MELICHAR	:	
Defendant	:	

ADDITIONAL STATEMENT OF FACTS AND CONCLUSIONS OF LAW ON COMPLAINT OF BETTY JANE OST TO DETERMINE DISCHARGEABILITY OF A DEBT

STATEMENT OF FACTS

This case was remanded, after appeal, for further determination in light of Illinois law of whether a settlement agreement was intended by the parties to be a discharge of the husband's common law duty to support his wife and thus a nondischargeable debt in bankruptcy. The Court was asked to make specific findings and conclusions concerning the settlement agreed including (1) the notation of a "fixed sum", (2) the continuation of payment after remarriage, (3) the termination of payments upon the hus-

band's death, (4) the termination possibility after 108 months, (5) the wife's adultery and her recrimination defense to divorce, (6) the factors the parties maintain went into the calculations of the amounts provided for in the agreement, and (7) the provisions for waiver of alimony.

CONCLUSIONS OF LAW

Two provisions of Illinois law describe three distinct awards that may be ordered by the Court when parties are divorced. Section 17 of the Divorce Act (ILL. REV. STAT. Ch. 40, par. 18) provides for property settlements when either party holds title to property equitably belonging to the other. Section 18 (ILL. REV. STAT. Ch. 40, par. 19) permits either periodic alimony, or a settlement in lieu of alimony, payable in gross or in installments. A settlement in lieu of alimony under section 18 of the Act is distinct from a division of the property rights of the parties under Section 17, which can be ordered only if specifically alleged in a complaint and established by competent evidence at trial. *Palacio v. Palacio,* 33 Ill. App. 3d 1074, 339 N.E. 2d 427 (1975).

Alimony in gross, also known as a settlement in lieu of alimony, is "an arrangement for support and maintenance in which the entire award is vested, not subject to modification and definite in amount, regardless if the award consists of the payment of money or the transfer of specific real or personal property, or both." *Id.* 339 N.E.2d at 430.

Alimony in gross is distinguished from periodic alimony in that the latter is extinguished by the remarriage of the spouse receiving payments and the former is not affected by remarriage. Further, periodic alimony is usually extinguished by the death of the paying party (although the

parties may agree otherwise), while alimony in gross is always a charge upon the paying party's estate. The basic effect of electing alimony in gross is that it is not modifiable by the Illinois courts; periodic alimony payments may be modified or terminated by the courts given the requisite showing. *Walters v. Walters,* 341 Ill. App. 561, 94 N.E.2d 726, *aff'd,* 409 Ill. 298, 99 N.E.2d 342 (1950).

The law of Illinois regarding alimony awards is that the method of payment, as well as the terms and labels used by the parties and those used in the decree, are not conclusive in determining whether an award is a property settlement, periodic alimony or alimony in gross. *Jacobson v. Jacobson,* 50 Ill. App. 2d 244, 200 N.E.2d 379 (1964). However as pointed out, *supra,* questions of property settlement must be specially pleaded as required by Section 17 of the Illinois divorce act. In this case, such a settlement was not pleaded, as the parties elected alimony in gross in their settlement agreement.

Most of the factors which entered into the settlement ageement (and which were to be specifically addressed on remand) point to the conclusion that alimony in gross or settlement in lieu of alimony was intended by the parties. These include the facts that the payments were of a definite amount, (a lump sum payable in installments), the factors which the parties contended entered into the calculations of the amount, and the provisions waiving alimony in the future, since under Illinois law, a party cannot receive both periodic alimony and alimony in gross. Most importantly, the payments were to continue even after the wife's remarriage, a situation which is prohibited by the Illinois Divorce Act § 18 in the case of periodic alimony. The fact that the agreement provided that the payments were restricted to 108 if the wife remarried and

121 if she did not seems irrelevant. The important factor is that the husband voluntarily agreed to continue paying installments even after the wife's remarriage. The issue of adultery also appears to be irrelevant since the husband entered into the agreement with full knowledge of his wife's adulterous relationship. The only factor which is adverse to the definition of the payments as alimony in gross is the provision that the payments will terminate upon the husband's death. This is also prohibited by § 18 of the Act.

The Court need not reach a conclusion on this issue, however, since whether the award is titled periodic or in gross, the fact remains that it is alimony and not a property settlement. A settlement in lieu of alimony or alimony in gross is defined by the Illinois courts as an award for the support and maintenance of the spouse receiving it. *Palacio, supra; See also,* citations therein. The Court finds that the agreement here contemplated support and maintenance of the wife in line with the definition in Illinois law. The bankrupt testified that the money payable to the wife was to be used by her to maintain the same economic position as she had maintained during their marriage. The wife testified that her husband told her that he and her attorney had budgeted her expenses and arrived at payments she would require to live on after the divorce.

Although the payments do not continue after the husband's death, the sum total of the other factors add up to alimony in gross, intended by the parties as support and maintenance of the wife, in discharge of the husband's common law duty, rather than as a property settlement.

Notwithstanding the above findings with respect to the law of Illinois as directed by the appellate tribunal on remand, the Court feels it should reiterate its original findings and conclusions in this case. The Court previously

found that it should consider the entire transaction between the parties and that if it determines the purpose of the payments is for the support of the wife, the debt is not dischargeable. *See Remondino v. Remondino,* 41 Cal. App.2d 208, 106 P.2d 437 (1940). *See also, Kadel v. Kadel,* 250 N.E.2d 420 which held that a lump sum payment for maintenance and support was considered in the nature of alimony and not dischargeable. In *Shacter v. Shacter,* Case 77-01068 G, this Court decided on April 5, 1978 that it is not bound by a State Court's definition of alimony but is bound to determine, from the facts, the intention of the parties. On appeal to the United States District Court for the District of Maryland, that finding was upheld, and District Judge C. Stanley Blair rejected appellant's contention that the debt was in the nature of a property settlement since the payments required by the separation agreement did not meet the requirements of technical alimony under Maryland law. Civil No. B-78-1485 decided March 16, 1979. On appeal to the Court of Appeals for the Fourth Circuit, the findings of this Court and the District Court were affirmed, and the Court of Appeals stated, "As the opinion of the District Judge clearly established (a) the definition of alimony under State law is not controlling on the federal question of what constitutes "alimony" or "maintenance and support" for the purposes of the Bankruptcy Act, and (b) the obligations of appellant do constitute "alimony" or "maintenance and support" within the meaning of the bankruptcy statute. No. 79-1266 decided November 20, 1979.

In view of the above findings, the Court concludes the debt is nondischargeable under §17a(7).

Dated December 21, 1979

/s/ Glenn J. Goldburn
GLENN J. GOLDBURN
Judge, United States Bankruptcy
Court for the District of
Maryland

cc: Charles C. Bowie, Esq.
Bert W. Kapinus, Esq.

copies mailed

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THEODORE F. MELICHAR	:	
	:	
V.		CIVIL NO. K-78-498
	:	
		BANKRUPTCY NO. 76-00921 G
BETTY JANE OST	:	

ORDER

(1) The within case is hereby remanded to the Bankruptcy Judge for further proceedings in accordance with the opinion of this Court filed on this date.

(2) Counsel for both sides have stated they will be prepared to submit to the Bankruptcy Judge proposed findings of facts and legal memorandum and to be available for further proceedings, if any, before the Bankruptcy Judge, all as scheduled by the Bankruptcy Judge. While specific time-tables for the same were discussed on the record during a recent hearing in this Court in colloquy among this Court and counsel, this Court presently is of the opinion that all scheduling should be appropriately determined by the Bankruptcy Judge.

(3) It is so ORDERED, this 14th day of November, 1978.

(4) The Clerk is directed to mail copies of this Order and of the opinion filed even date herewith to counsel of record.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THEODORE F. MELICHAR	:	
	:	
V.	:	CIVIL NO. K-78-498
	:	
		BANKRUPTCY NO. 76-00921 G
BETTY JANE OST	:	

Filed: November 14, 1978

Bert W. Kapinus, Mt. Rainier, Maryland, for Appellant.
Charles C. Bowie, Rockville, Maryland, for Appellee.

KAUFMAN, DISTRICT JUDGE.

This case is before this Court on appeal for the second time. In Melichar v. Ost, 445 F.Supp. 1162 (D.Md. 1977) this Court, on December 16, 1977, remanded the within case to the Bankruptcy Judge for further proceedings in accordance with this Court's opinion. Thereafter the Bankruptcy Judge filed, on February 16, 1978, the attached "Amended Statement of Facts and Conclusions of Law . . . ." Regretfully, this Court concludes that a further remand is required.

The background concerning the alimony exception in bankruptcy is discussed in some detail in this Court's December 16, 1977 opinion and will not be repeated herein. The determination of whether the settlement agreement here in issue is dischargeable in bankruptcy depends upon the answers to two questions: (1) Does a husband have, under the law of Illinois, a common law duty to support his former wife? (2) If the answer to question (1) is "Yes", was the settlement agreement in this case in fact entered into in discharge of that common law duty?

The existence, vel non, of a common law duty to support in Illinois presents a question of law. Judge Goldburn's two opinions

strongly suggest that he has concluded that such a duty does exist. This Court agrees. In Walters v. Walters, 341 Ill.App. 561, 94 N.E.2d 726, 729 (1950), aff'd, 409 Ill. 298, 99 N.E.2d 342 (1951), the Court stated:

> "Payments of alimony from husband to wife are not based upon any consideration moving from wife to husband, but are based upon the common law duty of the husband to support his wife."

See also, Balasa v. Balasa, 11 Ill.App.2d 103, 136 N.E.2d 594, 595 (1956); Kohler v. Kohler, 31 Ill.App.2d 151, 175 N.E.2d 603, 604 (1961); Chamberlin v. Chamberlin, 119 Ill.App.2d 295, 256 N.E.2d 159, 161 (1970).

The question of whether the settlement agreement in this case was intended by the parties to discharge the husband's common law duty to his wife is a factual one for determination by the Bankruptcy Judge. Judge Goldburn initially observed that "[t]estimony of the parties indicates that the amount payable to the wife was to maintain her economic position and the Court concludes that it is in the nature of alimony and is nondischargeable . . . ." In its December 16, 1977 opinion, 445 F.Supp. at 1167-68, this Court, quoted extensively from Richheimer v. Richheimer, 9 Ill.App.3d 376, 292 N.E.2d 190, 193-94 (1972), and wrote (at 1169) that "the Melichar agreement is ambiguous, containing provisions of a property settlement (continuation of payments after remarriage; notation of a "fixed sum") as well as provisions suggestive of an alimony arrangement (termination of payments upon death of husband; premature termination possibility after 108 months)." In a case in which the settlement agreement is ambiguous, Illinois law permits and perhaps suggests the advisability of reference to parol evidence. Richheimer v. Richheimer, 292 N.E.2d supra at 193-94. Because the Bankruptcy Judge is in the best position to determine the intent of the parties, this Court remanded the within case to him for further

consideration with reference to Illinois law. Upon remand Judge Goldburn supplemented his earlier opinion and concluded that "the amount payable to the wife by the husband is in the nature of alimony and is nondischargeable," citing a California case upon which he relied in his first opinion. As of this date it is not clear whether the Bankruptcy Judge considered and determined both the meaning of Illinois case law and applied the same to the facts in this case. Further, the Bankruptcy Judge's findings of fact in his two opinions are only general in nature. Accordingly, the within case is hereby again remanded to the Bankruptcy Judge. Upon remand the Bankruptcy Judge may conduct such a further evidentiary or nonevidentiary hearing, if any, as he shall determine. However, in any event, the Bankruptcy Judge is asked to set forth in detail in a further opinion specific reasons, in light of Illinois law, why he concludes that the settlement agreement was or was not intended by the parties to be in discharge of the husband's common law duty to his wife and therefore nondischargeable or dischargeable. In so doing, the Bankruptcy Judge is asked to make specific findings of facts and conclusions of law, taking into account all of the terms and provisions of the Settlement Agreement including, inter alia, (1) the notation of a "fixed sum", (2) the continuation of payments after remarriage, (3) the termination of payments upon the husband's death, (4) the termination possibility after 108 months, (5) the wife's adultery and her recrimination defense to divorce, (6) the factors which the parties maintain went into the calculations of the amounts provided for in the agreement, and (7) the provisions for waiver of alimony.

United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE	:	
THEODORE F. MELICHAR	:	
Bankrupt	:	
BETTY JANE OST	:	Bankruptcy No. 76-00921 G
Plaintiff	:	
vs.	:	
THEODORE F. MELICHAR	:	
Defendant	:	

AMENDED STATEMENT OF FACTS AND CONCLUSIONS OF LAW ON COMPLAINT OF BETTY JANE OST TO DETERMINE DISCHARGEABILITY OF A DEBT

STATEMENT OF FACTS

This case was remanded on appeal with instructions that this Court set forth in more detail the facts upon which it reached its conclusions. In addition to the facts outlined in the first Statement of Facts, the Court also considered the testimony of the husband who testified that the $66,550.00 he agreed to pay his wife was arrived at by him as the figure he could pay and still have an amount sufficient on which to live and it was also an amount which was sufficient to satisfy the Internal Revenue Service that it was alimony. He further testified that both he and his wife, prior to their divorce, lived with the persons whom they later married and that he intended that the money he was to pay his wife was to be used to maintain her in the same economic position to which she was accustomed while they were married.

The wife testified that her husband had told her that he and her attorney had budgeted her expenses and arrived at the payments she would require to live on after their divorce. She also testified that he told her he would pay more than $600.00 per month since she was earning $550.00 per month. The Agreement stated, and the wife testified, she was to be deeded the house and was to make the mortgage payments, and her husband was to maintain life insurance to insure against any default in his monthly payments to her.

CONCLUSIONS OF LAW

In Remondino v. Remondino, 41 Cal. App. 2nd 208. 106 P. 2nd 437 (1940), the Court stated that "if, upon a consideration of the entire transaction the Court determines that the purpose of the judgment for support money is to guarantee the economic safety of the wife by the husband, then his discharge in bankruptcy does not affect his liability under the judgment". From the testimony of the husband during cross-examination that the money payable to his wife was to maintain the "same economic position as previously", and was an amount sufficient to satisfy the Internal Revenue that it was alimony, this Court concludes that this case falls within the Remondino v. Remondino decision and finds that the amount payable to the wife by the husband is in the nature of alimony and is nondischargeable.

Dated February 16, 1978

Glenn J. Goldburn
United States Bankruptcy Judge

cc: Bart Kapinus, Esq.
Charles C. Bovis, Esq.
Mailed 2-16-78

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THEODORE F. MELICHAR 76-00921-G	:	
	:	
V.	:	CIVIL NO. K-77-391
	:	
BETTY JANE OST (015)	:	

ORDER

This case is hereby remanded to the Bankruptcy Judge for further proceedings in accordance with the opinion of this Court filed today.

The Clerk is directed to mail copies of the aforesaid opinion and of this Order to counsel of record. It is so ORDERED, this 16th day of December, 1977.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

THEODORE F. MELICHAR :
76-00921-G :
:
V. : CIVIL NO. K-77-391
:
BETTY JANE OST :
(015)

Filed: December 16, 1977

Charles C. Bowie, of Rockville, Maryland, for Appellant.

Bert W. Kapinus, of Mt. Ranier, Maryland, for Appellee.

KAUFMAN, DISTRICT JUDGE.

This case involves the attempted discharge in bankruptcy of a payment provision in a marital settlement agreement.[1] The agreement was executed in Illinois in 1974 by defendant Melichar and plaintiff Ost (then Mrs. Melichar). The part of the marital settlement agreement from which the defendant-husband seeks discharge reads as follows:

> The husband further covenants and agrees that he shall pay to the wife as and for a lump sum settlement in lieu of alimony, the sum of SIXTY SIX THOUSAND FIVE HUNDRED FIFTY AND NO/100 ($66,550.00) DOLLARS, said sum to be payable at the rate of FIVE HUNDRED FIFTY AND NO/100 ($550.00) DOLLARS per month for a period of ONE HUNDRED TWENTY ONE (121) months, the first of said payments to be made simultaneously with the execution of this agreement by by [sic] both parties. It is further provided that the husband shall be liable for such monthly installment payments for a period of ONE HUNDRED EIGHT (108)months or nine (9) years, regardless of the remarriage of the wife. The parties further covenants [sic] and agree

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1 Jurisdiction exists pursuant to 28 U.S.C. § 1334. As to the procedures to be followed and the standard of review to be followed with relation to the Bankruptcy Judge's determination, see Bankruptcy Rules 102, 801 and 810. The latter provides as follows:

[Footnote cont'd on page 2]

> that after the expiration of the aforesaid ONE HUNDRED EIGHT (108) months or nine (9) year period, if the wife is already married or if the wife should remarry, the obligation of the husband for any future payments shall abate, however, the husband shall be liable for any past due unpaid installments then due and owing. In the event of the death of the husband or wife, at any time during the ONE HUNDRED TWENTY ONE (121) months, there shall be a one hundred percent (100%) abatement of the respective future installments due and owing to the wife pursuant to the provisions of this agreement.

That part of the contract is exclusively for the benefit of the wife, and contains the only undertaking by the husband relating to maintenance, support or alimony. Other paragraphs of the agreement provide for child support and property divisions.

The agreement was signed in April, 1974; the couple were divorced in Illinois in July, 1974. Plaintiff-wife remarried in August, 1974, becoming Mrs. Ost. In August, 1976, the defendant-husband instituted a bankruptcy proceeding in this Court, seeking, inter alia, to be discharged from the above quoted obligations to plaintiff. The latter timely objected to such discharge. Both parties rely upon 11 U.S.C. § 35(a)(7):

> (a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as * * * (7) are for alimony due or to become due, or for maintenance or support of a wife or child, or for seduction of an unmarried female or for breach of promise of marriage accompanied by seduction, or for criminal conversation;* * *.

Defendant-husband contends that the obligations in question constitute installment payments relating to a lump sum property settlement and are therefore dischargeable.

[Footnote 1 cont'd from page 1]

> Upon an appeal the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge of the credibility of the witnesses.

During the hearing on December 14, 1976 before the Bankruptcy Judge, defendant produced evidence that plaintiff had cohabited with her present husband (Mr. Ost) and had planned to marry the latter, prior to the signing of the agreement, and that the obligations in question in this case were bargained for by plaintiff and agreed to by defendant in order to make plaintiff financially comfortable in her contemplated new marriage. Plaintiff also testified during that hearing that prior to the consummation of the agreement she had planned to remarry soon after divorce, and that the obligations were contracted for by plaintiff and defendant with that consideration in mind.

On February 2, 1977, the Bankruptcy Judge filed the document appended hereto as Attachment A. Defendant, in his within appeal therefrom, challenges the finding below that the obligations were intended to cover "support and maintenance"[2] and contends that debts relating to marital settlements are excepted from discharge only if they arise from a common law duty to support one's spouse.

The section 35(a) (7) exception was first inserted into the bankruptcy act in 1903. Just before that legislation was adopted, the Supreme Court dealt with the dischargeability of alimony obligations, and the like, in Audubon v. Shufeldt, 181 U.S. 575 (1901). Subsequent to the 1903 legislation, the Supreme Court, in Dunbar v. Dunbar, 190 U.S. 340 (1903), and in Wetmore v. Markoe, 196 U.S. 68 (1904), considered the question of whether, in each case, an ex-husband's obligation to support his ex-wife was dischargeable in bankruptcy. The section 35(a)(7) exception had not yet become effective at the time of either ex-husband's bankruptcy. In Wetmore,

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[2] Defendant's primary position is as stated supra in the body of this opinion. Secondarily, however, he seems to question the Bankruptcy Judge's exclusion, early during the December 14, 1976 hearing, of testimony relating to plaintiff's cohabitation and her remarriage plans. However, the Bankruptcy Judge later allowed evidence, apparently unrefuted, as to plaintiff's cohabitation with plans for remarriage. Accordingly, no harm was done by its earlier exclusion even if that exclusion constituted error.

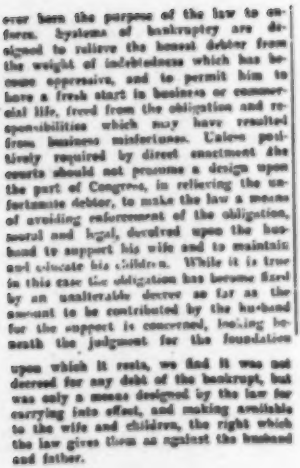
the Court wrote (at 72-7):

> In the case of *Audubon v. Shufeldt*, 181 U. S. 577, 45 L. ed. 1010, 21 Sup. Ct. Rep. 736, Mr. Justice Gray, delivering the opinion of the court, said:
>
> "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. * * *"
>
> * * * We think the reasoning of the *Audubon Case* recognizes the doctrine that a decree awarding alimony to the wife or children, or both, is not a debt which has been put in the form of a judgment, but is rather a legal means of enforcing the obligation of the husband and father to support and maintain his wife and children. He owes this duty, not because of any contractual obligation, or as a debt due from him to the wife, but because of the policy of the law which imposes the obligation upon the husband. The law interferes when the husband neglects or refuses to discharge this duty, and enforces it against him by means of legal proceedings.
>
> * * *
>
> In the case of *Dunbar v. Dunbar*, decided by this court at the October term, 1902 (190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 787), it was held that a contract made after divorce between husband and wife, by which the former agreed to pay the latter a certain sum of money annually for her support during her life, or so long as she remained unmarried, and also to pay a certain sum of money to her annually for the support of the minor children of the marriage, whose custody was awarded to the mother, was not discharged by a subsequent proceeding and discharge in bankruptcy. It was further held that the sum agreed to be paid for the support of the minor children was but a recognition of the liability of the father for their support, and that the fact that the annual instalments were made payable to the wife made no difference in the character of the obligation. Of this feature of the contract the court, speaking by Mr. Justice Peckham, said:
>
> "In relation to that part of the husband's contract to pay for the support of his minor children until they respectively become of age, we also think that it was not of a nature to be proved in bankruptcy. At common law, a father is bound to support his legitimate children, and the obligation continues during their minority. We may assume this obligation to exist in all the states. In this case the decree of the court provided that the children should remain in the custody of the wife, and the contract to contribute a certain sum yearly for the support of each child during his minority was simply a contract

to do that which the law obliged him to do; that is, to support his minor children. . . . We think it was not the intention of Congress, in passing a bankruptcy act, to provide for the release of the father from his obligation to support his children by his discharge in bankruptcy, and if not, then we see no reason why his contract to do that which the law obliged him to do should be discharged in that way. As his discharge would not in any event terminate his obligation to support his children during their minority, we see no reason why his written contract acknowledging such obligation and agreeing to pay a certain sum (which may be presumed to have been a reasonable one) in fulfilment thereof should be so discharged. It is true his promise is to pay to the mother; but on this branch of the contract it is for the purpose of supporting his two minor children, and he simply makes her his agent for that purpose."

We think this language is equally applicable to the present case in that aspect of the decree which provides for the support of the minor children. The obligation continues after the discharge in bankruptcy as well as before, and is no more than the duty devolved by the law upon the husband to support his children, and is not a debt in any just sense.

It is urged that the amendment of the law made by the act of February 9, 1903 (32 Stat. at L. 797, chap. 487), excepting from the operation of a discharge in bankruptcy a decree for alimony due or to become due, or for the maintenance and support of the wife and minor children, is a legislative recognition of the fact that, prior to the passage of the amendment, judgments for alimony would be discharged. In *Dunbar* v. *Dunbar*, 190 U. S. 340, 47 L. ed. 1084, 23 Sup. Ct. Rep. 787, it was said that this amendment, while it did not apply to prior cases, may be referred to for the purpose of showing the legislative trend in the direction of not discharging an obligation of the bankrupt for the support and maintenance of wife and children. The amendment may also have been passed with a view to settling the law upon this subject, and to put at rest the controversies which had arisen from the conflicting decisions of the courts, both state and Federal, upon this question. Indeed, in view of the construction of the act in this court in *Audubon* v. *Shufeldt*, 181 U. S. 575, 45 L. ed. 1009, 21 Sup. Ct. Rep. 735, it may be said to be merely declaratory of the true meaning and sense of the statute. *United States* v. *Freeman*, 3 How. 556, 11 L. ed. 724; *Bailey* v. *Clark*, 21 Wall. 284, 288, 22 L. ed. 651, 653; *Cope* v. *Cope*, 137 U. S. 682, 693, 34 L. ed. 832, 834, 11 Sup. Ct. Rep. 222. The bankruptcy law should receive such an interpretation as will effectuate its beneficent purposes, and not make it an instrument to deprive dependent wife and children of the support and maintenance due them from the husband and father, which it has



ever been the purpose of the law to enforce. Systems of bankruptcy are designed to relieve the honest debtor from the weight of indebtedness which has become oppressive, and to permit him to have a fresh start in business or commercial life, freed from the obligation and responsibilities which may have resulted from business misfortunes. Unless positively required by direct enactment the courts should not presume a design upon the part of Congress, in relieving the unfortunate debtor, to make the law a means of avoiding enforcement of the obligation, moral and legal, devolved upon the husband to support his wife and to maintain and educate his children. While it is true in this case the obligation has become fixed by an unalterable decree so far as the amount to be contributed by the husband for the support is concerned, looking beneath the judgment for the foundation upon which it rests, we find it was not decreed for any debt of the bankrupt, but was only a means designed by the law for carrying into effect, and making available to the wife and children, the right which the law gives them as against the husband and father.

In In re Adams, 25 F.2d 640 (2d Cir. 1928), Judge Learned Hand applied the reasoning of Wetmore in a case factually similar to the present case. Adams involved a pre-divorce agreement which provided for maintenance and support for the wife, until her remarriage or death. Subsequent to the signing of the agreement, the husband obtained a divorce on the grounds of his wife's adultery. Two years after obtaining the divorce the husband stopped payments, and several years later, while being sued by the wife's estate for arrearages, declared bankruptcy, seeking to be discharged of these payments. Judge Hand recognized that the husband would only be liable in bankruptcy for these payments if they were in discharge of his common law duty of support, and wrote as follows (at 642):

The question then arises whether they are dischargeable under section 17 (a) (2) (11 USCA § 35(2)) either as "liabilities" for "alimony" or "for maintenance or support of wife or child." That they are not liabilities for alimony appears not only because they were not granted by decree, but because in New York the guilty defendant is not entitled to alimony. Waring v. Waring, 100 N. Y. 570, 3 N. E. 229; Palmer v. Palmer, 1 Paige, 276 (semble); Perry v. Perry, 2 Barb. Ch. 311. On the other hand, it is plain that, so far as concerns any installments falling due before the divorce, they were certainly for the maintenance of the bankrupt's wife. However, all those in suit here fell due after the divorce, and consequently at a time when the appellant had no wife and could be under no duty to maintain or support one. Hence the appellant argues that they did not fall within section 17 (a) (2), even though the contract was made while the marital duty existed and in part at least provided for its discharge.

This might be true if it appeared that the payments to be made before the divorce were reckoned as full compensation for the wife's right of support during that period, so that the remainder were left without any matrimonial foundation. We have, however, no reason to suppose that this was the case. The parties presumably acted with knowledge of their rights, and therefore of the fact that after a divorce the husband would be under no further marital duty whatever. Unless there were some abatement of the earlier payments in exchange for the later, these would have been a pure gratuity. Rather we think that the sum of all the payments, both before and after any divorce, was to be paid and accepted in full for that support and maintenance only which could be exacted by recourse to law. The fact that the parties chose to spread their payments over a period which might, if the suit proved successful, pass beyond the time when any such duty would exist presumptively affected their amount. Even so, those that fell due after the divorce did not lose their character as "liabilities for maintenance and support." They were similar to a provision in a separation settlement which might defer certain installments until after the death of the wife.

That this is not a factitious interpretation readily appears by considering the relations of the parties. Neither had any way of knowing whether the suit would succeed, what would be the limit of the husband's liabilities, if it did not, or, if it did, how long the wife might remain unmarried. It was by no means unnatural that they should decide to balance these two indeterminate aggregates against each other for the sake of ending their differences, relieving the husband for the present, and insuring the wife a continuance of support while she needed it. At least until some more positive evidence appears of an intention to go beyond the mutual legal rights of the parties, we have no reason to assume that they were actuated by motives of complaisance. It is true that in Dunbar v. Dunbar it was intimated that the reason why, if provable, such a debt would not be discharged, was that it might be regarded as in substitution for alimony, the wife being guilty of no "moral delinquency." While that cannot be the basis of our conclusion here, the case at bar is nevertheless distinguishable, because the settlement was there made only after the divorce and when therefore no marital duty any longer existed which it could liquidate.

And see Norris v. Norris, 324 F.2d 826 (9th Cir. 1963), in which the husband-bankrupt won a discharge from his obligation to make certain payments to his ex-wife. In that case, after the agreement had been made, the marriage was subsequently declared null and void, seemingly because the husband was married at the time of the "purported marriage". The Court wrote (at 828):

> It is well settled that "[a]limony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, express or implied, but on the natural and legal duty of the husband to support the wife," [Audubon v. Shufeldt, 181 U.S. 575, 577, 21 S.Ct. 735, 736, 45 L.Ed. 1009 (1901)] and it is the obligation based on this duty which is saved from discharge in bankruptcy by Section 17, sub. a(2) of the Act. Wetmore v. Markoe, 196 U.S. 68, 76, 25 S.Ct. 172, 49 L.Ed. 390 (1904).

The case at bar may be distinguishable from Adams, since there is evidence herein which could be relied upon to conclude that defendant's payments to plaintiff were intended to care for the wife's anticipated needs after her remarriage. If so, the post-remarriage obligations may not represent an undertaking by defendant in exchange for abatement of his pre-remarriage and/or pre-divorce undertakings. Thus, the entire $66,550 undertaking may represent a replacement for the husband's common law obligation of pre-divorce and/or pre-remarriage support. On the other hand, if that undertaking was intended primarily for the benefit of the wife in her new marriage, then it would not constitute a replacement of the husband's common law duty of support.

As stated supra, the agreement in question was executed in the State of Illinois. Illinois is also the state in which the parties were divorced.[3] Accordingly, this Court looks to the law of that state in order to determine the nature of the agreement.[4] The law of that state requires a recognition that the contractual provision in question contains elements of both a straight property settlement (dischargeable in bankruptcy) and of an alimony agreement (which, being based on the common law duty of support, is non-dischargeable). The discussion in Richheimer v. Richheimer,

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3 See page 1, supra.

4 Matter of Cornish, 529 F.2d 1363 (7th Cir. 1976) (applying Illinois law); In re Nunnally, 506 F.2d 1024 (5th Cir. 1975) (applying Texas law); In re Waller, 494 F.2d 447 (6th Cir. 1974) (applying Ohio law); Damon v. Damon, 283 F.2d 571 (1st Cir. 1960) (applying Maine law); In re Adams, supra, (applying New York law).

9 Ill. App.3d 376, 292 N.E.2d 190, 193-4 (1972) is illuminating:

> If the monthly payments are periodic alimony, the agreement cannot be enforced despite the specific provisions in the agreement that payments will continue despite plaintiff's remarriage. Balasa v. Balasa (1956), 11 Ill.App.2d 103, 107-109, 136 N.E.2d 594, 596-597. Therefore, we turn to an examination of the agreement to determine if the payments were periodic alimony. In this regard, we take particular note of the recent case of Sudler v. Sudler (1972), 6 Ill.App.3d 546, 286 N.E.2d 113. In that case, as in the instant case, the agreement contained a provision that the remarriage of the wife would not terminate periodic payments from the husband. The court found that the language of the property settlement contained language characteristic of both a lump sum agreement and periodic alimony. In such a case, where the language was ambiguous as to whether or not the wife was receiving periodic alimony, the court held that parol evidence was admissible to determine the original and true intention of the parties to the agreement. The court stated at 6 Ill.App.3d 548-549, 286 N.E.2d 114:
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> > In interpreting the provisions of a divorce decree, the court seeks to give effect to the intentions of the parties, and the normal rules pertaining to the construction of contracts are applicable. Brandel v. Brandel, 69 Ill.App.2d 264, 267, 216 N.E.2d 21 (1966); Vinci v. Vinci, [131] Ill.App. [2d 496], 266 N.E. 2d 379, 382 (1970). Thus, the parties' intentions must be determined from the language of the instrument itself, unless the instrument is incomplete or the language is ambiguous, in which case extrinsic evidence may be introduced as an aid to interpretation. Weiland Tool & Mfg. Co. v. Whitney, 44 Ill.2d 103, 114, 251 N.E.2d 242 (1969). Wilson v. Resolute Insurance Company, Ill.App., 267 N.E.2d 720, 723 (1971). An instrument is ambiguous if the words used by the parties are fairly susceptible of being understood in more than one sense. LaSalle Nat. Ins. Co. v. Executive Auto Leasing, 121 Ill.App.2d 430, 435, 257 N. E.2d 308 (1970); First Nat. Bank v. Victor Comptometer Corp., 123 Ill.App. 2d 335, 341, 260 N.E.2d 99 (1970).
>
> This agreement contains some characteristics of periodic alimony, but also language commonly identified with a lump sum settlement. We accept these principles to be sound and appropriate in a case where a settlement agreement lends itself to ambiguous interpretations. Where an ambiguity exists, the substance of an instrument, rather than the form, must control. In other words, the use of the word "alimony" is not conclusive. The language of the entire agreement must be examined to determine whether the financial arrangements set out therein are alimony payments.
>
> Turning to the agreement in the case at bar, it is indisputable that the monthly payments are referred to as "alimony" in paragraph 3 of the agreement. Another indication that periodic alimony was contemplated is found in paragraph 5 of the agreement which states that the parties understand that the monthly payments will be "periodic payments in discharge of a legal obligation . . . . ." Such references fall within the spirit of the rule that the use of the word "alimony" in an agreement incorporated in a divorce decree, while not conclusive as to whether the agreement was a property settlement or one for alimony, would certainly be an "indicium of intention" that periodic alimony was contemplated. Mayhaum v. Mayhaum (1952), 349 Ill.App. 80, 87, 110 N.E.2d 78, 81.
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> Defendant argues that there is a further indication that the monthly payments characterized periodic alimony by pointing to the language in the agreement concerning the actual amount of payments. It is urged there is no requirement in the agreement for payment of a gross fixed sum. Since it has been held that "alimony in gross" (*i. e.*, a lump sum agreement) is always for a definite sum, and none exists herein, the payments must be construed as periodic alimony. To support this contention, defendant cites Walters v. Walters (1950), 341 Ill.App. 561, 94 *N.E.2d* 726, *aff'd* 409 Ill. 298, 99 N.E.2d 342. In that case, the court held that the phrase "alimony in gross" or "gross alimony" represents an award of a definite amount of money. The court stated at 341 Ill.App. 568, 94 N. E.2d 729:
>
> > On the other hand, the phrase "alimony in gross" or "gross alimony" is always for a definite amount of money; the payment is always for a definite length of time; it is always a charge upon the husband's estate and has uniformly been held by our courts to be not modifiable.

Plaintiff, on the other hand, counters this line of reasoning by arguing that the terms of the agreement provided plaintiff with a 121 month period of guaranteed payments, at a fixed sum, unaffected by her remarriage.

In reviewing the above arguments by the parties, we are led to the conclusion that an ambiguity does exist. Although the agreement does contain characteristics of a periodic alimony set-up, there is also language in the agreement that points to a lump sum or gross agreement, particularly that which requires continuation of the payments if plaintiff were to remarry. The provision for payment of a fixed and certain sum to be paid for 121 months is susceptible to interpretation as a lump sum agreement. It is particularly significant that the payments during the initial 121 month period after the agreement are to be a charge against the husband's estate. By its very nature, alimony is limited to the life span of the husband. Where the balance of the payments are a charge against the estate of the husband in the event of his death, there is a strong inference that the payments were contemplated as part of a property settlement rather than as periodic alimony. In this regard, we note the language from the *Walters* case quoted above. Particular reference is made to the fact that the court held that a lump sum agreement "is always a charge upon the husband's estate." Walters v. Walters, supra.

At best, the agreement is not clear and unambiguous. As the court in *Sudler* found, while conceding that elements of periodic alimony appeared on the face of the agreement ". . . the language of the agreement also has much of the flavor of a lump sum agreement." A parallel situation presents itself in this case. Sudler v. Sudler (1972), 6 Ill.App.3d 546, 549, 286 N.E.2d 113, 115.

It is an established rule in [illegible] State that it is not necessarily the "label" placed upon payments by a divorce decree which establishes them as either alimony or lump sum settlements of property. Rather it is the elements inherent in the entire record in a case which determine what the payments constitute. The intention of the parties and the nature of the transaction must be analyzed to determine whether a particular settlement was a property settlement or a contract for periodic alimony. Walters v. Walters (1951), 409 Ill. 298, 302, 99 N.E.2d 342, 344. In view of this rule and the principles set out in the recent decision of this Court in the *Sudler* case, we conclude that parol evidence is admissible to determine the true intention of the parties to the agreement.

As was the agreement in the Richheimer case, the Melichar agreement is ambiguous, containing provisions suggestive of a property settlement (continuation of payments after remarriage; notation of a "fixed sum") as well as provisions suggestive of an alimony arrangement (termination of payments upon death of husband; premature termination possibility after 108 months). In this case,

at this time, the intent of the parties is not revealed either within the four corners of the agreement in question, or from the parol evidence of the contracting parties adduced to date. Defendant-husband asserts that the $66,550 undertaking was not intended as a discharge of his common law duties, due to the impending marriage of plaintiff, because under Illinois law the right to alimony ceases upon remarriage. That argument, however, begs the question as to whether the $66,550 was intended to compensate plaintiff for the common law duty defendant owed to her. Additionally, defendant argues that, because of his former wife's infidelity, she would have been unable to collect any alimony upon divorce. But that argument overlooks the husband's seeming infidelity, admitted by him during the December 14, 1976 hearing, and the apparent availability of recrimination as a defense to an adultery divorce action in Illinois. See Haring v. Haring, 125 Ill. App.2d 116, 260 N.E.2d 396, 399 (1970), in which the Court wrote:

> Defendant's defense of recrimination, affirmatively pleaded, if proved, would have barred plaintiff's divorce. The defense of recrimination has been repeatedly recognized by the courts of this State. As was stated in Elston v. Elston, 344 Ill. App. 233, 100 N.E.2d 635, 639 (2nd Dist. 1951), "Under such circumstances the rule long ago announced in Duberstein v. Duberstein, 171 Ill. 133, 49 N.E. 316, 320 [1898], is clearly applicable here. As in that case, the defendant asserted recrimination in defense of plaintiff's charges and thus we repeat: "Divorce is a remedy provided for an innocent party * * *; so that, when each party has committed a cause for divorce, the causes being of the same statutory character, neither can complain of the other. * * *" * * *."

Levy v. Levy, 388 Ill. 179, 57 N.E.2d 366, 370 (1944). Such an affirmative defense, however, must be proved by a preponderance of the evidence.

The Bankruptcy Judge may well have considered all of these factors in reaching his determination. He did write that the "[t]estimony of the parties indicates that the amount payable to the wife was to maintain her economic position and the Court concludes that it is in the nature of alimony. . ." But that statement is conclusory and/a bit too bare. The Bankruptcy Judge more than

is in a far better position than is this Court to determine the intentions of the parties in the light of the legal analyses set forth in this opinion. Accordingly, the within case will be remanded to the Bankruptcy Judge for further elucidation and clarification. Upon remand, the Bankruptcy Judge may conduct a further evidentiary hearing before he files his further opinion and judgment, if, but only if, he deems same appropriate.

Defendant-husband has not in this appeal contended that the section 35(a)(7) exception is constitutionally invalid as sex discrimination in favor of females and against males. Recently, a District Court has reached that conclusion. In re Wasserman, 46 U.S.L.W. 2073 (D.R.I. July 18, 1977). In the absence of any briefing or presentation by the parties, and in view of the fact that the determination upon remand by the Bankruptcy Judge may render unnecessary resolution of that constitutional issue, this Court expresses no view with regard thereto.

United States District Judge

ATTACHMENT A

STATEMENT OF FACTS

The Plaintiff and the Defendant bankrupt were married in 1953 and had four children. They entered into a "Marital Settlement Agreement" on April 18, 1974 and were divorced June 17, 1974.

Paragraph 8 of the agreement, which was incorporated in the divorce decree in Illinois provides for payments by the bankrupt to the wife of "a lump sum settlement in lieu of alimony" of $66,550.00, payable in certain monthly installments.

The bankrupt testified that the money payable to the wife was to be used by her to maintain the same economic position as she had previously maintained during their marriage. The wife testified that the bankrupt conveyed the house, in which they resided, to her, upon which she was to continue making the mortgage payments and that she and the bankrupt budgeted her expenses and arrived at the amount of monthly installments to be paid to her, to enable her to support herself until she became settled.

CONCLUSIONS OF LAW

The decisions are divided as to the construction of the word "alimony" in Section 17a(7) of the Act. A more reasonable view appears to be that the Bankruptcy Court should, as a court of equity, look behind the agreement, by the testimony of the parties, to determine for what purposes the payments were to be made. See Remondino v. Remondino, 41 Cal. App. 2nd 208, 106 P. 2nd 437 (1940), where the Court states that "if, upon a consideration of the entire transaction the Court determines that the purpose of the judgment for support money is to guarantee the economic safety of the wife by the husband, then his discharge in bankruptcy does not affect his liability under the judgment". The case of In re Avery, 114 F. 2nd 768 held that the Court may appoint a Master to determine what por-

tion of a judgment was for alimony and support and what portion was for property rights. In Re Sasseen, CCH Dec. para 64, 549, held that a Bill of Complaint should look into the merits of a divorce judgment. Payment by lump sum does not, alone, determine alimony, as stated in Kadel v. Kadel, 250 N.E. 2nd 420, where a lump sum payment for maintenance and support were considered in the nature of alimony. See also Myhers v. Myhers, 86 Cal. Reptr. 356, where it was held that even though the wife gave up some of the incidents of alimony in a property settlement, does not mean that she relinquished her rights as to the nondischargeability of the debt as alimony.

Testimony of the parties indicates that the amount payable to the wife was to maintain her economic position and the Court concludes that it is in the nature of alimony and is nondischargeable pursuant to Section 17a(7) of the Act.

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE	:	
THEODORE F. MELICHAR	:	
Bankrupt	:	
BETTY JANE OST 143 Sixth Avenue LaGrange, Illinois	:	Bankruptcy No. 76-00921 G
Plaintiff	:	
vs.	:	
THEODORE F. MELICHAR	:	
Defendant	:	

ORDER ON COMPLAINT OF BETTY JANE OST VS.
THEODORE F. MELICHAR DECLARING DEBT NONDISCHARGEABLE

The Court having concluded that the relief prayed for by the Plaintiff in the complaint should be granted, it is thereupon, this 2nd day of February, 1977, by the United States District Court for the District of Maryland

ORDERED, that the amount due the Plaintiff from the bankrupt under paragraph 8 of the "Marital Settlement Agreement" is nondischargeable.

Glenn J. Goldburn
United States Bankruptcy Judge

cc: Charles C. Bowie, Esq.
Bert W. Kapinus, Esq.
mailed 2/3/77

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

IN RE	:	
THEODORE F. MELICHAR	:	
Bankrupt	:	
BETTY JANE OST 143 Sixth Avenue LaGrange, Illinois	:	Bankruptcy No. 76-00921 G
Plaintiff	:	
vs.	:	
THEODORE F. MELICHAR	:	
Defendant	:	

STATEMENT OF FACTS AND CONCLUSIONS OF LAW
ON COMPLAINT OF BETTY JANE OST TO DETERMINE
DISCHARGEABILITY OF A DEBT

STATEMENT OF FACTS

The Plaintiff and the Defendant bankrupt were married in 1953 and had four children. They entered into a "Marital Settlement Agreement" on April 18, 1974 and were divorced June 17, 1974.

Paragraph 8 of the agreement, which was incorporated in the divorce decree in Illinois provides for payments by the bankrupt to the wife of "a lump sum settlement in lieu of alimony" of $66,550.00, payable in certain monthly installments.

The bankrupt testified that the money payable to the wife was to be used by her to maintain the same economic position as she had previously maintained during their marriage. The wife testified that the bankrupt conveyed the house, in which they resided, to her, upon which she was to continue making the mortgage payments and that she and the bankrupt budgeted her expenses and arrived at the amount of monthly installments to be paid to her, to enable her to support herself until she became settled.

CONCLUSIONS OF LAW

The decisions are divided as to the construction of the word "alimony" in Section 17a(7) of the Act. A more reasonable view appears to be that the Bankruptcy Court should, as a court of equity, look behind the agreement, by the testimony of the parties, to determine for what purposes the payments were to be made. See Remondino v. Remondino, 41 Cal. App. 2nd 208, 106 P.2nd 437 (1940), where the Court states that "if, upon a consideration of the entire transaction the Court determines that the purpose of the judgment for support money is to guarantee the economic safety of the wife by the husband, then his discharge in bankruptcy does not affect his liability under the judgment". The case of In re Avery, 114 F 2nd 768 held that the Court may appoint a Master to determine what portion of a judgment was for alimony and support and what portion was for property rights. In Re Sasseen, CCH Dec. para 64, 549, held that a Bill of Complaint should look into the merits of a divorce judgment. Payment by lump sum does not, alone, determine alimony, as stated in Kadel v. Kadel, 250 N.E. 2nd 420, where a lump sum payment for maintenance and support were considered in the nature of alimony. See also Myhers v. Myhers, 86 Cal. Rptr. 356, where it was held that even though the wife gave up some of the incidents of alimony in a property settlement, does not mean that she relinquished her rights as to the nondischargeability of the debt as alimony.

Testimony of the parties indicates that the amount payable to the wife was to maintain her economic position and the Court concludes that it is in the nature of alimony and is nondischargeable pursuant to Section 17a(7) of the Act.

Glenn J. Goldburn
United States Bankruptcy Judge

Dated February 2, 1977

cc: Charles C. Bowie, Esq.
Bert W. Kapinus, Esq.
Mailed 2/2/77